No. 2352

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Appellant,

vs.

ED. SCHMIDT,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Title of Court and Cause.]

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare for respondent in the above-entitled action the Apostles, viz., a certified copy of the entire record as filed with the exception of the Notice of Filing Bond for Costs and Staying Execution; Order Staying Execution and the Praecipe for Citation, etc., also a statement as required by Rule 4, Section 1, sub. 1, of the Admiralty Rules of the Circuit Court of Appeals.

KNIGHT & HEGGERTY,
Proctor for Respondent.

[Endorsed]: Filed Dec. 4, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [1*]

[Title of Court and Cause.]

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: Ed. Schmidt.

Respondent: Pacific Mail Steamship Company, a corporation.

PROCTORS.

Libelant: James W. Ryan, Esquire, San Francisco, California.

Respondent: Messrs. Knight and Heggerty (Chas. J. Heggerty, Esquire, appearing in the case), San Francisco, California. [2]

*Page-number appearing at foot of page of original certified Record.

PROCEEDINGS.

1913.

October 20. Filed verified Libel for wages.

Issued Citation for the appearance of the respondent herein and which said Citation was afterwards on the 25th day of October, 1913, returned and filed in this office with the return of the United States Marshal endorsed thereon, as follows:

"I have served this Writ personally by handing copy of this Writ to Charles J. Heggerty, Proctor for Respondent, whose admission of service is endorsed hereon at San Francisco, California, this 21st day of October, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Geo. H. Burnham,
Chief Office Deputy.

The defendant Pacific Mail Steamship Company in the within entitled cause hereby admits service of the within Citation this 21st day of October, 1913.

PACIFIC MAIL STEAMSHIP COMPANY,
By KNIGHT & HEGGERTY,
Its Proctors."

October 25. Filed Answer of Pacific Mail Steamship Company, to the Libel herein.

October 27. Filed libelant's Exceptions to Respondent's Answer.

October 29. The Exceptions filed herein to the Answer of the respondent, this day came on for hearing in the District Court of the United States for the Northern District of California, First Division, before the Honorable M. T. Dooling, Judge. [3]

After hearing counsel for the respective parties the Court ordered the said exceptions overruled and that counsel proceed with the trial of said cause. Thereupon after the producing of witnesses and arguments of counsel the cause was submitted and after consideration the Court filed its written opinion in favor of the libelant.

November 5. Filed Decree.

November 14. Filed Notice of Appeal.

November 18. Filed Assignment of Errors.

November 22. Filed Transcript of Testimony taken in open court. [4]

In the District Court of the United States, Northern District of California, First Division.

IN ADMIRALTY—No. ——.

ED. SCHMIDT,

Libelant,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Respondent.

Libel for Mariner's Wages.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States in and for the Northern District of California, First Division:

The libel of Ed. Schmidt, mariner, late chief steward on board the American steamship "City of Sydney," and a resident of the City and County of San Francisco, State of California, against Pacific Mail Steamship Company, a corporation duly created, organized, and existing under and by virtue of the laws of the State of New York, and having its principal place, or one of its principal places, of business at the City and County of San Francisco, State and Northern District of California, and engaged in the business of carrying passengers and cargo by sea, now or late owner of said steamship "City of Sydney," in a cause of wages, civil and maritime, alleges as follows:

I.

That in the month of September, one thousand

nine hundred and thirteen, at the port of San Francisco, in the State and Northern District of California, the said respondent, the said Pacific Mail Steamship Company, a corporation, by its agent or [5] agents, did hire the libelant to serve as chief steward on board the said steamship "City of Sydney," for part of a voyage from the port of Balboa, in the Republic of Panama, to said port of San Francisco, and for part of a voyage from said port of San Francisco to said port of Balboa, at the wages of one hundred dollars ($100.00) per month and an allowance of one dollar ($1.00) for each and every day as victualling money; and that in pursuance of said agreement the libelant entered into the service of the respondent as such chief steward on board the said steamship on or about the forenoon of the twenty-fifth day of September, in the year aforesaid.

II.

That the said steamship "City of Sydney," having taken the libellant on board as chief steward, discharged her cargo, and made freight, and completed her voyage from the said port of Balboa to the said port of San Francisco; and immediately thereafter began taking, and thereafter continued to take, on board a cargo for a voyage from the said port of San Francisco to the said port of Balboa, with the libelant on board as chief steward.

III.

That on or about the evening of the first day of October, in the year one thousand nine hundred and thirteen, and after the said steamship "City of Sydney" had taken on board part of said cargo for

said voyage from the port of San Francisco to the port of Balboa, the respondent, by its agent or agents, without any cause, and without the consent of the libelant, and against his will, turned him on shore, and would not permit him to perform any part of the remainder of said voyage, and the said steamship is now making the said voyage and is not now within the Northern District of California.

IV.

That during the whole time the libelant was on board the said steamship "City of Sydney" he well and faithfully performed his **[6]** duty as such chief steward, and was obedient to all lawful commands of the respondent, by its agent or agents, whereby he became entitled to demand, and he did demand, and there was due to him, at the time that respondent so turned him on shore, to wit, on the evening of the first day of October, in the year aforesaid, one-third part of the wages then earned by him, to wit, the sum of ten and 11/100 ($10.00) dollars, over and above all just deductions and whereby he became entitled to demand, and he did demand, and there was due to him, four days after respondent so turned him on shore, to wit, on the evening of the fifth day of October, in the year aforesaid, the balance of his wages under said agreement, to wit, the sum of twenty and 22/100 ($20.22) dollars, over and above all just deductions; and that no part of said wages and victualling money, or wages or victualling money, has been paid to libelant.

V.

That all and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE the libelant prays that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said Pacific Mail Steamship Company, a corporation, owner as aforesaid, and that it may be required to appear and answer, on oath, all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment by respondent to libelant of the wages and allowance for victualling money aforesaid, to wit, the sum of thirty and 33/100 ($30.33) dollars, with interest and costs, and a sum equal to one day's pay for each and every day during which payment of said wages and victualling money has been delayed beyond the evening of the first day of October, in the [7] year aforesaid, to wit, the sum of eighty-two and 27/100 ($82.27) dollars, and a sum equal to one day's pay for each and every day during which payment of said wages and victualling money shall be delayed beyond the date of the filing of this libel, together with interest; and that the libelant may have such other and further relief in the premises, as in law and justice he may be entitled to receive.

JAMES W. RYAN,
Proctor for Libelant.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Ed. Schmidt, being first duly sworn, deposes and

says that he is the libelant in the foregoing libel; that he has read the same and knows the contents thereof, and that the said libel is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters that he believes it to be true.

ED. SCHMIDT.

Subscribed and sworn to before me this 20th day of October, 1913.

[Seal] W. B. MALING,
U. S. Commissioner.

[Endorsed]: Filed Oct. 20, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

Citation for Appearance of Respondent.

Northern District of California,—ss.

The President of the United States of America, to the Marshal of the United States for the [Seal] Northern District of California, Greeting:

Whereas, a Libel has been filed in the District Court of the United States for the Northern District of California, on the 20th day of October, in the year of our Lord one thousand nine hundred and thirteen.

By Ed. Schmidt vs. Pacific Mail Steamship Co., in a certain action for wages, civil and maritime, to recover the sum of $112.60, and Int. (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant and praying that a citation may issue against the said respondent, pursuant to the rules

and practice of this Court; NOW, THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if ——— shall be found in your District, that ——— be and appear before the said District Court, on the 25th day of October, A. D. 1913, at 10 o'clock in the forenoon, at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make ——— allegations in that behalf; and have you then and there this writ, with your return thereon.

WITNESS, the Honorable M. T. DOOLING, Judge of said Court, the 20th day of October, in the year of our Lord, one thousand nine hundred and thirteen and of our independence, the one hundred and 38th.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

JAMES W. RYAN,
Proctor. [9]

MARSHAL'S RETURN.

I have served this writ personally by handing copy of this Writ to Charles J. Heggerty, proctor for respondent, whose admission of service is endorsed hereon at San Francisco, California, this 21st day of October, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Geo. H. Burnham,
Chief Office Deputy Marshal.

The defendant Pacific Mail Steamship Company in the within entitled cause hereby admits service of the within citation this 21st day of October, 1913.

PACIFIC MAIL STEAMSHIP COMPANY,
By KNIGHT & HEGGERTY,
Its Proctors.

[Endorsed]: Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[10]**

[Title of Court and Cause.]

Order Shortening Time Within Which Respondent May Appear and Answer.

Good cause appearing therefor, IT IS HEREBY ORDERED that the time within which Pacific Mail Steamship Company, a corporation, the respondent above-named, may appear and answer to the libel filed by libelant, the said Ed Schmidt, in the above-entitled cause, will be, and hereby is, shortened so that said respondent must appear and answer the said libel on or before Saturday, the 25th day of October, 1913.

Dated, San Francisco, Cal., October 20, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[11]**

[Title of Court and Cause.]

Answer to Libel.

To Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California:

Comes now the Pacific Mail Steamship Company, the respondent above named, by its Proctors Knight & Heggerty, and answers the Libel filed herein by Ed Schmidt, libelant, as follows, to wit:

1. Answering Article I of the Libel, respondent denies that libelant was ever hired to serve as chief steward of said vessel for a part of a voyage on said vessel from Balboa to San Francisco, or for part of a voyage from San Francisco to Balboa, or that he ever entered upon or performed any services under any such employment at the wages alleged or at any wages or at all; or as chief steward or a seaman on said vessel; but avers that libelant was a member of the crew of said vessel and signed articles as chief steward thereon for the round voyage in July, 1913, from San Francisco to Balboa and return to San Francisco, that on the return of said vessel to San Francisco prior to September 25, 1913, and after she was made fast at her dock and had **[12]** finished her said *round voyage* the said employment of libelant ceased his employment as a seaman on said vessel ended and he then ceased to be a member of the crew of said vessel and was paid off in full his wages as a member of the crew of said vessel; that on about September 25, 1913, respondent employed li-

belant on shore wages and not as a member of the crew of said or any vessel and not as chief steward of said or any vessel, but to render and perform shore services for the respondent on its dock and about said vessel in the City and County of San Francisco and not otherwise; that libelant never did sign or enter into any shipping articles upon or about said or any vessel after said vessel had returned and tied up to her dock on her return from said round voyage, or after he had been paid off in full through and by the United States Shipping Commissioner on the return of said vessel to this port; and that said vessel has no crew or chief steward while she is in port or until she is ready to sail on her voyage, at which time every member of the crew of said vessel signs shipping articles before the United States Shipping Commissioner, and cannot become a member of the crew of said vessel and sail from port without signing such articles, and on the return of said vessel to this port her entire crew, including libelant, who had signed articles as chief steward thereon, was paid off by and through said United States Shipping Commissioner.

2. Answering Article II of said Libel, respondent denies that libelant was taken on board said vessel, or was on board said vessel or rendered service on said vessel as chief steward after the time she returned on said round voyage and after the time he was paid off as such chief steward and discharged from the shipping articles, as chief steward of said vessel, or that said vessel thereafter had or could have a chief steward until she was ready to sail and

her crew and a member of her crew should sign shipping articles as such chief steward. **[13]**

3. Answering Article III of said libel, respondent denies that it turned libelant on shore, or that it did so without any cause or would not permit him to perform the remainder of said voyage; but avers that from the time libelant was paid off as chief steward of said vessel on her return from her said round voyage and after he had signed off the articles and received his wages and had been paid in full through and by said Shipping Commissioner, he never was or became or was upon or rendered or performed any services on said vessel as chief steward; and that he only performed port service, and was employed on shore or port service upon shore or port wages, and not otherwise; that said libelant is not a mariner and that his alleged wages are not a mariner's or seaman's wages.

4. Answering Article IV of said libel, respondent denies that during the whole time libelant was on board said vessel he well or faithfully performed his duty as chief steward, or that he ever became entitled to or to demand or ever did demand that there was due him any sea pay or any pay or wages for services as chief steward of said vessel, or that there was ever due him any of the sums of money alleged in said libel; or that there is now or ever was due libelant or unpaid to him any sum or amount or balance for or on account of his wages or his services as chief steward of said vessel; but, on the contrary, that he has been and was paid in full for all of his services on said vessel as a member of the crew

thereof as such chief steward upon the termination of said round voyage, and he never signed on said vessel again as such chief steward or at all; that he did after said vessel had been made fast to her dock and her said round voyage had terminated receive his wages in full by and through said Shipping Commissioner and before the said commissioner he did sign off the said articles as such chief steward and thereupon ceased to be such chief steward **[14]** of said vessel, and was never signed on said articles again as chief steward or at all; that after the libelant had so signed off the articles as such chief steward and had been paid off his wages as such in full, he went on shore duty and shore pay and not as a member of the crew of said vessel, and he earned wages as such amounting to $30.33 on the port payroll of the said vessel; that while libelant was the chief steward of said vessel and upon the shipping articles as such upon said round voyage to Balboa and back to San Francisco, leaving this port in July, 1913, and returning in September, 1913, he received into his care and custody, the respondent delivering into his possession and safekeeping as such chief steward, the following personal property, viz:

5 Vegetable deep dishes, large, silver-plated, each of which was of the reasonable value and which were valued at $5.50, or a total of $27.50;
6 Table Forks, Silver Plated, valued at $1.12;
5 Table Knives, Silver Plated, valued at $1.25;
2 Dessert Spoons, Silver Plated, valued at .43;
12 Tea Spoons, Silver Plated, valued at $1.70;
12 Messroom Spoons, German Silver, valued at .90;

and all being of the reasonable value of the total sum of $32.90; that said libelant did not return the said personal property to respondent or account for the same, and that libelant has never returned or redelivered the said personal property to respondent, nor has he accounted for the same in any manner; and that he has persistently refused to account to respondent for the said personal property or pay to the respondent the said or any value thereof; and that respondent has at all times been ready and willing and has offered to pay to libelant the said port pay and wages of $30.33 upon libelant returning to respondent the said personal property or paying to respondent its value, and that respondent [15] has refused and now refuses to pay to libelant his said port pay and wages of $30.33 unless and until he shall return *to* redeliver said personal property to respondent and account to respondent therefor; and that said debt and obligation due to the respondent by libelant offsets and discharges libelant's claim for wages.

5. Answering Article V of said libel, respondent denies that all and singular or all or singular the premises in said Libel are true or within the Admiralty and Maritime jurisdiction of the United States or of this Honorable Court; but avers that all of said alleged services rendered by libelant were and are shore and port services and not a sea service, and that said services were not and are not seaman's services and said libelant was not a seaman or mariner in the performance thereof, and that said alleged demand and claim is not a claim or demand for and

the said services and wages do not constitute and are not a seaman's wages or a mariner's wages, or within the jurisdiction of Court of Admiralty.

WHEREFORE, respondent prays to be hence dismissed with its costs, and that said Libel be dismissed with costs to respondent.

Dated: October 25th, 1913.

KNIGHT & HEGGERTY,
Proctors for the Respondent. **[16]**

United States of America,
State of California,
City and County of San Francisco,—ss.

A. J. Frey, being duly sworn, says: I am assistant manager of the respondent; I have read the foregoing Answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

A. J. FREY.

Subscribed and sworn to before me this 25th day of October, 1913.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[17]**

[Title of Court and Cause.]

Exceptions of Libellant to Answer.

The libellant above-named hereby excepts to the answer of Pacific Mail Steamship Company, a corpo-

ration, respondent in this cause, as follows:

I.

That the allegations in the fourth article of said answer on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are irrelevant, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or transaction or contract set forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of September, in the year nineteen hundred and thirteen, and terminated on the first day of October. in the year aforesaid.

II.

That the allegations in the fourth article of said answer [18] on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are impertinent, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or transaction or contract set

forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of September, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid.

III.

That the allegations in the fourth article of said answer on page four, from and including the seventh line to and including the thirty-second line, and on page five, from and including the first line to and including the seventh line, are insufficient, because said allegations are not responsive to any of the allegations of the libel on file herein, and because said allegations of said answer attempt and purport, or attempt or purport, to allege matters constituting an offset and setoff and counterclaim, or offset or setoff or counterclaim, not arising out of the cause of action or transaction or contract set forth in said libel, to wit, the cause of action for mariner's wages on a contract entered into on the twenty-fifth day of September, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid.

In which particulars the libellant insists that the respondent's said answer is irrelevant and impertinent and insufficient: wherefore the libellant excepts thereto, and prays that the allegations of said answer excepted to as aforesaid may [19] be expunged with costs.

JAMES W. RYAN,
Proctor for Libelant.

[Endorsed]: Filed Oct. 27, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[20]**

At a stated term of the District Court of the United States for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 29th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,483.

ED. SCHMIDT,

Libelant,

vs.

PACIFIC MAIL STEAMSHIP COMPANY,

Respondent.

Order Overruling Exceptions to Answer, etc.

This cause this day came on for hearing on the Exceptions to the Answer filed herein, and after hearing counsel for the respective parties, by the Court ordered that said Exceptions be and the same are hereby overruled.

The hearing of the cause was then proceeded with, James W. Ryan, Esq., appearing for libelant, and Chas. J. Heggerty, Esq., appearing for respondent. Mr. Ryan called Edward Schmidt, who was fully sworn and examined as a witness in his own behalf. Mr. Heggerty called W. E. Deazie and Alexander B. Muir, who were each duly sworn and examined, and thereupon after hearing arguments said cause was submitted to the Court for decision.

After due consideration had thereon the Court filed its written opinion, and by the Court ordered that a decree be entered in favor of the libelant for the amount prayed for in his libel. **[21]**

[Title of Court and Cause.]

Testimony Taken in Open Court.

Wednesday, October 29, 1913.

COUNSEL APPEARING.

For the Libelant: JAMES RYAN, Esq.

For the Respondent: Messrs. KNIGHT & HEGGERTY (CHARLES J. HEGGERTY, Esq.).

The above-entitled cause came regularly on for trial this Wednesday, October 29, 1913, before the Court sitting without a jury, and the following proceedings took place:

[Testimony of Ed. Schmidt, the Libelant.]

ED. SCHMIDT, the libelant, sworn:

Mr. RYAN—Q. What is your name?

A. Ed. Schmidt.

Q. How old are you? A. 44.

Q. What is your occupation?

A. I have not done anything since October 1st; before that I had been chief steward on different boats, lately on the steamer "City of Sidney."

Q. Have you been employed since you left the steamer "City of Sidney"? A. No, sir.

Q. Where do you reside? A. 550 Eddy Street.

Q. What is that—is it a hotel? A. A hotel.

Q. Did you sign shipping articles with respondent in this case before the Shipping Commissioner in

(Testimony of Ed. Schmidt.)

July, 1913? A. No, sir. [22]

Q. You did not sign shipping articles?

A. I did sign shipping articles, yes, sir.

Q. When did you return from that voyage?

A. On September 23.

Q. And then you were paid by the Shipping Commissioner here? A. Yes, sir.

Mr. HEGGERTY.—Let him testify, Mr. Ryan, and do not lead him.

Mr. RYAN.—Q. What was the procedure after you returned from the voyage regarding receiving your money?

A. I got paid off by the Shipping Commissioner, my wages due to me for that voyage.

Q. What was your understanding regarding your remaining employed?

Mr. HEGGERTY.—We object to his understanding.

Mr. RYAN.—I withdraw the question.

Q. Why did you remain on board the ship?

A. I was still chief steward on the boat and not notified I had been discharged for anything and I worked on board as chief steward.

Q. What are the duties of the chief steward on the steamer? A. During the voyage?

Q. Yes, during the voyage.

A. He is simply the head of the Commissary Department, keeps the rooms clean and look after the passengers and so on.

Q. What else?

(Testimony of Ed. Schmidt.)

A. To look after his help and see that the work is done.

Q. What does the chief steward do?

The COURT.—Q. You have charge of the rooms of the passengers, have you? A. Yes, sir.

Mr. RYAN.—Q. What does the chief steward do after he arrives in port?

A. After he arrives here we clean the ship.

Q. You mean you superintend it?

A. Yes, and see that the stores are put on board for the next voyage, get the ship ready for sea [23] for the next voyage.

Q. Is your work while in port very similar to that while on the voyage? A. Yes.

Mr. HEGGERTY.—Let him state what he does.

Mr. RYAN.—Q. What is the difference between your duties while on the voyage and while the ship is in port?

A. The difference is we have no passengers on board, while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage.

Q. When are the supplies ordered and who orders them?

A. I put in a requisition for supplies and deliver the requisition-book to the port steward.

Q. Who places those provisions on board?

A. The chief steward—he sees that it is put on board.

Q. How many men are employed under you while the vessel is on the voyage?

(Testimony of Ed. Schmidt.)

A. The steward's department, or what they call the Commissary department in that company, has 22.

Q. That includes the title of what positions?

A. The steward, the steerage cooks and bakers, butchers, cooks, waiters.

Q. How long after the ship arrives at the dock do the seamen go before the Shipping Commissioner and receive their wages?

A. Generally it is the day after.

Q. And how long before the vessel leaves the dock do the seamen go before the Shipping Commissioner and sign new articles?

A. One day before leaving on that voyage.

Q. Who employs the men under you?

A. I employ them myself.

Q. Who employs you?

A. The port steward of the company.

Q. He employed you for the voyage to Balboa too?

A. Yes, sir.

Q. It is stated by defendant in its answer that certain vegetable dishes, table forks, dessert spoons, knives, teaspoons and 12 mess-room spoons were delivered to you before you went to Balboa; were [24] those articles delivered to you?

A. They were not directly delivered to me; it was stated that the articles were on board the ship; they had not been counted out to me by other company officials.

Q. Did you see the statement of the articles in your department on board the ship before going to

(Testimony of Ed. Schmidt.)

Balboa? A. I did not.

Q. How many days before the ship left were you employed as chief steward?

A. About two days before.

Q. Was any inventory taken in your presence before the ship left this port? A. No, sir.

Q. Did you sign any paper acknowledging the receipt of these articles? A. I did not.

Q. Did you know that these articles were on board at any time during the voyage?

A. I counted the small articles such as knives, forks, spoons and so on, and more or less there are always a few missing.

Q. Five vegetable dishes?

A. I did not count them; I always have enough for my service; I never run short of any.

Q. Where are these articles placed on a voyage?

A. The vegetable dishes particularly are in the pantry.

Q. And the other articles?

A. The other articles in that ship are in the dining-room, locked up in the locker.

Q. But during meal hours where are they?

A. After the ship is at sea it is open all the time.

Q. Who has access to the rooms where these articles are during the daytime and the night time, who has access to these dishes, and so forth?

A. Whoever uses them, the waiters and so forth, they help themselves, to set the table.

Q. Do the passengers have access to the rooms where these articles are? A. No, they do not.

(Testimony of Ed. Schmidt.)

Q. During the meal times these articles are placed on the table? A. Yes, sir. [25]

Q. If any of these articles were missing from the tables after meals would you know it, would it be reported to you?

A. No, you would not know it.

Q. Before the ship left on the voyage to Balboa, where were these articles on the ship?

A. Such as knives, forks and spoons were in the dining-room; all silver, ladle dishes, such as the vegetable dishes, were in the pantry.

Q. Could anyone going on board the ship have access to the room where these articles were?

A. In the pantry, yes, at any time.

Q. Anybody going on board the ship?

A. Yes, sir.

Q. Would it have been possible for a stranger or a seaman or any other person to have gone on the ship before the ship left on the voyage to Balboa and have taken any of these articles, before you were employed as seaman?

Mr. HEGGERTY.—I object to that as highly leading and suggestive.

Mr. RYAN.—I simply ask if it is possible for anyone to take the articles.

The COURT.—He has already said that the articles while in port were accessible to anybody. You have that same failing that other attorneys have; you think the Court cannot understand as well as you can understand what the witness says.

Mr. RYAN.—Q. Where did you perform your

(Testimony of Ed. Schmidt.)

duties while the vessel was in port?

A. On board the ship.

Q. Would you ever have any duties on the dock? Did you do any work on the dock?

A. The only duties I would do is commissary credits, such as wine or beer bottles, to be delivered on the dock and count them out and so forth.

Q. But you remained on the vessel all the time then? A. Oh, yes.

Q. Could you sleep there at night, or did you sleep there at night?

A. I could remain there if I wanted to; my room is there. **[26]**

Q. Mr. Heggerty said there was a different contract after the shipping articles are signed, and a different rate of pay; after you had been paid by the Shipping Commissioner you remained at the vessel at the same rate of pay?

A. At the same rate and one dollar for meal money because we don't cook on board the ship.

Q. How many persons were employed on board the ship as seamen who are entitled to that?

A. Only officers.

Q. After the ship arrived in port from Balboa how long did it take for it to discharge its cargo, or about how long, or was it discharging its cargo during all the time you were on board the vessel?

The COURT.—Q. Was this at Balboa or was it at San Francisco? A. San Francisco.

Mr. RYAN.—Q. After the vessel arrived in San Francisco, upon its return from Balboa, was the

(Testimony of Ed. Schmidt.)

vessel discharging and receiving new cargo during all the time you were on board the vessel?

A. During all the time, so far as I know.

Q. And the men were working on it all the time?

A. Yes, sir.

The COURT.—Q. Has this ship regular sailing-day dates? A. Yes, sir, a regular schedule.

Mr. RYAN.—Q. How long have you been a chief steward? A. I have been since 1910.

Q. What did you do before that?

A. I was butcher, in the same employ, two years.

Q. Who hired you on the voyage to Balboa and return? A. The port steward.

Q. That was on what day—what time of day?

A. I don't know that I got that appointment here, or not.

The COURT.—Q. Was this the July appointment?

A. July 22d. [27]

Q. You misunderstood me. Did you receive your money from the Shipping Commissioner?

A. Yes, sir.

Q. What day? A. September 24.

Q. What time of day?

A. During the noon hour.

Mr. RYAN.—Q. Then you remained on board the vessel for how long?

A. Until October 1st in the P. M.

Q. At what o'clock? A. At 5 o'clock.

Q. Is that the regular time for quitting?

A. That is the time we are supposed to be off work.

Q. How did you happen to leave the vessel?

(Testimony of Ed. Schmidt.)

A. Well, on October 1st, at 4 o'clock, the port steward brought a man there to relieve me, stating that I am relieved from that ship; the time was up at 5 o'clock that night.

Q. Did you receive any other word from the agent of the steamship company?

A. I received a paper of discharge from the Pacific Mail Steamship Company.

Q. Have you that paper of discharge with you?

A. No, I tore that up.

Q. What did that paper of discharge state?

A. It was addressed to me as chief steward, steamship "City of Sidney," "Dear Sir: You are hereby detached from the steamship 'City of Sidney' and as we don't know how soon we can utilize your services, we suggest that you look for employment otherwise or seek employment otherwise."

Q. That letter was addressed to you as chief steward? A. Yes, sir.

Q. When did you destroy that letter?

A. Right after I received it.

Q. Why?

Mr. HEGGERTY.—What difference does that make?

Mr. RYAN.—I want to show that he did not destroy it so that it could not be produced in court here.

The COURT.—Oh, I suppose he destroyed it because he was provoked. [28]

Mr. RYAN.—Q. Has any part of the wages on that voyage to Balboa, after the time the ship arrived

(Testimony of Ed. Schmidt.)

at the dock here, been paid to you? A. No.

Q. Did you receive any money at all for your work on the ship here after it returned from Balboa?

A. I did not.

Q. Was it your understanding upon your return from Balboa on that trip and your receiving the money from the Shipping Commissioner under the shipping articles that you were to cease to be a member of the crew of said steamer "City of Sidney"?

A. No, sir—

Mr. HEGGERTY.—Just a moment; we object to what his understanding was; he can state the facts.

Mr. RYAN.—If your Honor please, there was a contract entered into then and he can state what the terms of the contract were. The answer states that he ceased to be a member of the crew of the vessel at that time. We contend that there was an implied contract entered into.

The COURT.—He has stated that he did remain on board because he had not been discharged, and he was performing the services around there incident to the duties of a steward when employed.

Mr. RYAN.—I have already asked him whether it was usual for seamen if they were not discharged after being paid by the Shipping Commissioner to remain on board at the same rate of wages. That is the implied contract. He can state his understanding of the terms of the contract.

The COURT.—You may ask him, if you have not

(Testimony of Ed. Schmidt.)

done so already, what the custom was in that regard.

Mr. RYAN.—Q. What was the custom, after a seaman had been paid by the Shipping Commissioner, as to whether or not they should remain in the service of the steamship?

A. The custom was if the company did not want to keep the man there if they did not discharge him he would remain there and do the work of chief steward. [29]

Q. Was it not the custom of the steamship companies at this port—

Mr. HEGGERTY.—Mr. Ryan, you had better let him testify.

The COURT.—He has told you that, Mr. Ryan; he has told you that the custom was for the steamship company to discharge those they did not wish to re-employ.

Mr. RYAN.—Q. Did they tell each man definitely that he was discharged? A. Not on the return, no.

Q. How would they know that they were not to remain on board the vessel?

Mr. HEGGERTY.—He has already stated, your Honor, that those who were to be discharged they discharged, and those who were not discharged remained there.

Mr. RYAN.—But I am asking for the terms of the discharge, how it was made evident.

Mr. HEGGERTY.—But if he was not discharged what is the difference about anybody else?

(Testimony of Ed. Schmidt.)

Mr. RYAN.—I want to show that the company wanted him to remain on board as chief steward. We certainly have a right to show the terms of the contract.

The COURT.—Q. How were the men discharged when they got into port if they were not to be reemployed?

A. They simply kept on their work.

Q. How would they know that they are still employed there?

A. If they are not notified they still keep on in the same position.

Q. When they were discharged were they notified?

A. Yes, sir.

Q. By whom?

A. By a letter from the Flood Building; from the office. For instance, my letter I got the day after I got discharged.

Q. Would that be true of the men under you—would you tell any man you did not want?

A. I would just tell him he was finished, your time is up at [30] 5 o'clock.

Q. And he leaves? A. Yes.

Q. And if you did not tell him that his wages would go right on? A. Yes, sir.

Mr. RYAN.—Q. And with reference to the officers, it was customary for them to receive a letter from the steamship company, was it? A. Yes, sir.

Q. And the chief steward is an officer of the vessel?

(Testimony of Ed. Schmidt.)

A. Oh, yes, he is a superior; any man who has somebody under him is a superior.

Q. Did you ever employ men on the vessel while it is in port and before they sign shipping articles intending that they shall go on a voyage?

A. I do. I discharge and employ.

Q. Is the signing of shipping articles necessary before a man takes a place under you, and before you take your place on board the ship as a seaman for a voyage to a foreign port? Is it necessary that he go before the Shipping Commissioner and sign shipping articles before he takes employment as a seaman on that vessel?

A. No; I employ him during the time and then when the time comes the member is to sign shipping articles.

Q. Then all the members go down and sign the articles before the Shipping Commissioner?

A. Yes, sir.

Q. From whom do you receive your money for your wages from the time you are employed on the vessel in port or when you are held over in port, to the time when you sign shipping articles?

A. On the same day, as a rule, when you sign shipping articles in port, before leaving you sign them, and then you get your money from the purser of the ship.

Q. Why did the steamship company discharge you?

A. No particular reason that I know of. I simply got a paper of discharge stating for me to seek em-

(Testimony of Ed. Schmidt.)

ployment elsewhere, that they cannot tell how soon they can utilize my services. [31]

Q. When did you ask for your money as Port Steward from the steamship company?

A. You mean as the chief steward in port?

Q. Yes.

A. It was October 3d or 2d; October 2d.

Q. Was that before or after you received the letter from the steamship company?

A. That was before I received that letter.

Q. Was it after you had been notified that a new chief steward had taken your place?

A. It was after.

Q. What did you do when you went to see them regarding your wages, to whom did you go?

A. I went to the purser on the ship, who pays off, there on that day.

Q. What did you say to him?

A. I went there and asked him for the port pay due to me and the answer was that the auditor did not give him the money for me, and for me to see the auditor. I went up to the Flood Building and asked him about my wages due him and he answered me that I owed him $32.90 for silver missing on the ship; that my wages amounted to $30.30, and he cannot do anything for me.

Q. How many and of what value are the articles that are usually lost in the Commissary Department while a vessel is on a voyage from Balboa here?

Mr. HEGGERTY.—We object to that, your Honor, as immaterial, irrelevant and incompetent,

(Testimony of Ed. Schmidt.)

and there is nothing in showing something that is usually lost.

The COURT.—I suppose he means the ordinary breakage, and so on.

Mr. RYAN.—That is what I asked. I understood by "lost" to mean by breakage.

Q. What articles and of what value are the articles which are broken, or stolen by passengers and other persons from the Commissary Department during the voyage of a ship from Balboa to San Francisco?

Mr. HEGGERTY.—I object to that. I don't suppose there is any custom about the stealing of such articles. **[32]**

Mr. RYAN.— I did not say custom; I said, what was the usual amount lost. I want to show this was a very unusual thing, that these five vegetable dishes should be lost.

A. As a rule, there is always more or less knives, teaspoons or such things lost; it averages about from $3.00 to $5.00 on a two-months trip. Such a thing as vegetable dishes, I never heard of any loss before.

Q. Has that money, so far as you know, ever been deducted from your pay, or that of any other chief steward, before the Shipping Commissioner, for such breakage or loss?

Mr. HEGGERTY.—We object to that. You ought to know that that is incompetent, Mr. Ryan.

Mr. RYAN.—I withdraw the question.

Q. Did you understand that you were to pay for

(Testimony of Ed. Schmidt.)

any articles that were lost in your department?

Mr. HEGGERTY.—We object to that, what his understanding was. He has not stated that he had any duties at all.

The COURT.—The objection is sustained. Whatever the terms of the contract are they are the terms and the Court has to construe them finally. It really is not necessary for you to anticipate the defendant's defense anyhow. Whatever the terms of the contract are it is a written contract, and unless there is some ambiguity about it, it is not what the witness understood or what either party understood, it is what the contract says.

Mr. RYAN.—But, your Honor, he was on the vessel before he signed shipping articles to Balboa and he was on the vessel after he had been released from the shipping articles, and it is our contention that these articles may have been lost between those times.

The COURT.—If they were not lost under the terms of the shipping articles then probably he would not be responsible; but that is not because he understands it so, or because he says so, but it is [33] because the law makes it so. The objection is sustained. Proceed with your examination.

Mr. RYAN.—That is all.

Cross-examination.

Mr. HEGGERTY.—Q. When you went on the "Sidney" to perform the duties of chief steward, prior to sailing for Balboa, who took you to the vessel?

A. The port steward, Mr. Veazie.

(Testimony of Ed. Schmidt.)

Q. Was there any other steward there at the time that you and Mr. Veazie met? A. Yes, sir.

Q. Who was he?

A. I don't know his first name. I think his name is Thurlow.

Q. What was done on the "Sidney" by you and Mr. Thurlow, whatever his name was, the former chief steward, when Mr. Veazie took you to the vessel, concerning the property that you were to have charge of during that voyage?

A. I came on board the ship. I asked him, I wanted to take stock of the silverware; he could not find the keys; after finding a bunch of keys, none of them could open the locker. That is all there was to it. We went about other work. There was never a knife or a fork taken out of the locker and counted on the table; in fact, I could not open them until the morning of leaving. The saloon-boy had the keys; in fact, he could not open the drawers where the knives, forks and spoons were. I did not know how many vegetable dishes I had, whether 30 or 40 or 50, or what it was. There was no stock taken at all.

Q. Did you not have the equipment-book before you showing the amount of equipment that was on hand?

A. Not at that time, no.

Q. Before you sailed from San Francisco at all, did you not find out—did you not open the pantry and open the drawers and find out what was in them?

(Testimony of Ed. Schmidt.)

A. No, sir. [34]

Q. When did you open them?

A. The pantry is always open, where the silver dishes are.

Q. Are the silver dishes out on shelves—open?

A. Yes.

Q. Then you did not need a key?

A. Those are the silver-plated dishes.

Q. Did you see how many of those were there?

A. No, sir.

Q. Why?

A. I didn't have time; I had lots of other things to do. I did not know what crew I had on board.

Q. That was two days before sailing?

A. Yes, sir.

Q. Didn't you and Mr. Thurlow go over the property in the steward's department? A. No, sir.

Q. Did not Mr. Veazie go over it with you?

A. No, sir.

Q. Nobody at all? A. Nobody.

Q. You simply went on without knowing what was there?

A. I went on cleaning the rooms and having everything ready, and taking in stores, which was the most important thing to do. I saw that the stores came on board the ship and that none got lost and put them in the different places where they belonged.

Q. That is, you had an equipment-book where you entered down what you have?

A. That is during the voyage, for the stores.

(Testimony of Ed. Schmidt.)

Q. And when you start on the voyage do you know what you have on hand?

A. After I got the bills for the stores, I had to have it to make out my bills of fare and see that things run all right, after I got the bills.

Q. Haven't you got an equipment-book on the boat?

A. During the voyage, yes, sir.

Q. Didn't you go through that equipment-book and go through the steward's department to see whether the different property marked on that was there, or not?

A. I go through it to know how much linen I have, and things I have, [35] so I can run the boat, how many this and that and so on.

Q. Didn't you go through the culinary department?

A. Everything except the silver; I counted the knives, forks and spoons and small stuff once a week on the voyage. At Panama there is always a little more or less silver lost, knives and forks, but the big silver I didn't go through.

Q. You did not see that at all, or count it?

A. I seen it in the pantry.

Q. Did you bring back with you the same silver you took away? A. To my knowledge.

Q. How do you know you brought back the same amount you took away?

A. As I said before, the silver in the pantry—the pantryman uses that, and that we put on the table,

(Testimony of Ed. Schmidt.)

I always had sufficient. I never was short of any; I always had sufficient for the comfort of the passengers.

Mr. RYAN.—If your Honor please, I object to that question. I think maybe the witness misunderstands. Counsel said, "How many articles did you bring back with you?" It is not shown he brought any back or that he took any with him. It is putting words in the witness' mouth.

Mr. HEGGERTY.—Oh, I think he can tell his own story about it.

The COURT.—Now, gentlemen, although this is not a very important matter, considering the amount involved, I must insist that it be conducted as any case in court should be; if you have any objection to make, Mr. Ryan, you will rise and make it formally and the Court will pass on it.

Mr. RYAN.—Very well, your Honor.

Mr. HEGGERTY.—Q. Do you remember, before sailing on this voyage to Balboa and return, do you remember going to Mr. Veazie and telling him there were some things you could not find in the steward's department and in the culinary department, knives and [36] forks and silver?

A. Before sailing?

Q. Yes, before sailing?

A. You say something I could not find?

Q. Yes, that you had gone over the equipment and you could not find certain things that were marked there as on board? A. I don't remember.

(Testimony of Ed. Schmidt.)

Q. Do you remember Mr. Veazie telling you they were up at the stores and were being refitted or replated, and that they were subsequently sent on and you signed for them? A. I don't remember.

Q. After you came back you took an inventory of the property in the steward's department, did you not?

A. The assistant port steward took it with me.

Q. That was Mr. Muir, was it? A. Yes.

Q. Do you remember finding any discrepancy in the amount that was on hand when you got back?

A. You mean any shortage?

Q. Yes.

A. According to the equipment-book, I did.

Q. For instance, the vegetable dishes and these articles?

A. According to the equipment-book, the company's equipment-book according to that; I did not know how much was on board. According to that they counted it out and it was short.

Q. You don't sleep on the boat, do you—you didn't while you were on board?

A. I can if I want to but at that time I did not.

Q. And you don't eat on board? A. No.

Q. You are allowed one dollar a day in port for meals? A. Yes, sir.

Q. You refused to pay, did you not, for the amount of these different articles that Mr. Muir claimed, or that it was claimed by the company was short in the equipment of steward's department?

(Testimony of Ed. Schmidt.)

A. I did, yes, sir.

Q. And then, as I understand you, they refused to pay your port wages? A. Yes, sir. [37]

Mr. RYAN.—That is our case, and if your Honor please, we are willing to submit it without argument.

Mr. HEGGERTY.—Well, Mr. Ryan, aren't you going to give us a chance to put in any defense?

The COURT.—Yes, call your witnesses.

[Testimony of William E. Veazie, for Respondent.]

WILLIAM E. VEAZIE, called for the respondent, sworn.

Mr. HEGGERTY.—Q. What is your occupation?

A. Port steward of the Pacific Mail.

Q. Where are you located? A. Pier 42.

Q. Where is the pier at which the "Sidney" docks on her return to this city from her voyages?

A. Usually at Pier 42.

Q. Do you remember the voyage preceding the last return voyage where she docked?

A. I think she docked at the Folsom Street dock.

Q. Do you remember the occasion of the "Sidney" sailing on that round voyage with Mr. Schmidt on the "Sidney" as chief steward? A. Yes, sir.

Q. Who employed Mr. Schmidt as chief steward?

A. I recommended his employment to the main office.

Q. Who took him over to the boat? A. I did.

Q. Who did you meet at the boat when you went there?

(Testimony of William E. Veazie.)

A. Mr. Thurlow, who was then the chief steward of the "City of Sidney."

Q. What occurred, if anything, on the boat, with respect to the property in the steward's department, between you and Mr. Thurlow and Mr. Schmidt?

A. The ship's equipment-book was up at the auditor's office at the time and so I had my copy in my office there and I took that over with me and I told Mr. Thurlow to turn the silver over to Mr. Schmidt and after checking it up to let me know, and I left the book there with them. [38]

Q. And then you went away?

A. I went back to the office; yes, sir.

Q. And that is all you know about that?

A. About that particular circumstance, yes.

Q. Before the ship sailed did Mr. Schmidt come to you to talk about any property in the steward's department?

A. I think later in the day, or the next morning, I saw him and I asked him how was the silver, and he said it was all right, that there were some spoons short, and I said the spoons were short from the last voyage and they were being repaired from the general stores, and he would get them with a receipt to sign before sailing.

Q. And do you know whether he got them or not?

A. He did, yes, sir.

Q. After that did you have any conversation with him concerning the stores in his department, before sailing?

(Testimony of William E. Veazie.)

A. Nothing more than just a general inquiry *about he* found things, and what to do on the voyage and certain things to look after.

Q. Did he state whether or not he had gone over the matter and found the property that should be there in his department?

A. He stated to me that everything was all right, and I gave him this book to check up by .

Q. Mr. Schmidt was an old employee of the company for a long time in the Steward's department and in the Butcher department, was he?

A. Yes, sir.

Q. Upon his return from that voyage did you have any conversation with him concerning any of the property in the Steward's department?

A. Not until after they had taken stock and Mr. Muir, my assistant, reported to me that—

Q. (Intg.) You need not testify to that; I mean any conversation with Mr. Schmidt about it? [39]

A. No, sir; not until later.

Cross-examination.

Mr. RYAN.—Q. You do not know of your own knowledge whether Mr. Schmidt took an inventory of that property before he left on the voyage to Balboa, or not?

A. Nothing more than his word that everything was all right.

Q. He did not say that he took an inventory?

A. No, he did not use those words.

Q. You don't know whether he did or not?

(Testimony of William E. Veazie.)

A. No, sir.

Q. No one ever told you that he took an inventory?

A. He was left with instructions to take an inventory of the silver, and the book was left there with the two stewards.

Q. Was he supposed to take an inventory of all the silver in his department, the large silver and everything?

A. Yes, you do on all ships when you make a change.

Q. Is it usual for a man to do that when he is employed only two days before the vessel sails?

A. Certainly, if it is only one day.

Q. Is he not supposed to be working at other employment during that time?

A. He has other men doing the work around the ship; he only supervises.

Q. Is he not supposed to superintend that and see that it is done properly?

A. Not necessarily. The silver is a very important item.

Q. In other words, he has to go personally, when he is employed as steward, and go over everything in his department and check it up with the equipment-book?

A. It is his duty to go over the silver, yes.

Q. How many articles in that equipment-book generally?

A. It is according to the size of the ship.

Q. There are many hundred items?

(Testimony of William E. Veazie.)

A. Yes, sir. [40]

Q. How long would it take a man to check over the items in that equipment-book?

A. You do not check the general stock, you only check the silver, if it is a short time that way.

Q. That is, including the large silver and the dishes, and so on? A. Yes, sir.

Q. Do you know, of your own knowledge whether any of the large silver has ever been lost on a voyage before?

A. Well I cannot recall.

Q. Do you remember distinctly that Mr. Schmidt told you it was all right? A. Yes, sir.

Q. How do you happen to remember that so distinctly?

A. That is always a particular thing to look after, and I naturally wanted to know how it was coming out, and if there was any shortage to let me know, because we were transferring one ship to another.

Q. How many vessels come in here a week?

A. Well, we usually have two or three a week.

Q. And this vessel was gone three months, was it? A. No, sir, about 62 or 63 days.

Q. A little over two months? A. Yes, sir.

Q. And 24 vessels in the meantime would have come into this port, before this ship returned?

A. No, sir, we only have 16 vessels. There may be three in this week and only one in next week.

Q. At any rate, there were a number of vessels came in between the time this ship left for Balboa

(Testimony of William E. Veazie.)

and the time when she returned, and the stewards of all those vessels made reports to you regarding their silverware and other articles in the boat?

A. The silverware is checked up at the completion of the voyage.

Q. And each one of those checked up his articles with you, or made a report to you? A. Yes, sir.

Q. Did you keep a written memorandum of what the amount was?

A. If there is any shortage it is charged to them and it is replaced. [41]

Q. But do you keep a written memorandum whether it is all right, or not?

A. We don't take their word for it; it is put out on the dining-room tables and counted piece by piece.

Q. Each steward that goes out tells you that his silverware is all right or not all right before he goes, does he? A. Yes, sir.

Q. Approximately 15 or 20 of those stewards made such reports to you between the time this vessel left for Balboa and the time when she came back?

A. It is impossible to make any other report.

The COURT.—Q. When they come back they count the silver out on the table? A. Yes, sir.

Q. But before they go you take their word for it?

A. If they are not changed; it is in their possession all the time.

Q. In this case you took Mr. Schmidt's word for the presence of the silver on board?

A. He was responsible for it. He had orders to

(Testimony of William E. Veazie.)

check in with the old steward.

Mr. RYAN.—Q. Who is the head of the Commissary Department, the steward or the purser?

A. The purser.

Q. Why do you say then that the steward is responsible for it?

A. The steward is personally responsible for it; it is in his possession.

The COURT.—Q. What do you mean by personally responsible?

A. It is in his possession; it is not in the possession of the purser.

Q. How far do you assume his responsibility goes, to what extent? A. To make any shortage good.

Q. No matter what happens?

A. Well, I suppose it would not be in the case of a shipwreck. Any loss that takes place on the voyage the chief steward is responsible for.

Mr. RYAN.—Q. If $200 worth of silverware were lost you would expect that to be deducted from his wages? [42]

A. Well, his wages would amount to about that.

The COURT.—Q. Then he is, in your judgment, and in the judgment of the company an insurer of the silver, for anything short of shipwreck?

A. It is a valuable article on the ship, and he is supposed to use all diligence in taking care of it; somebody has to be held responsible for it, otherwise it would be pilfered.

Mr. RYAN.—Q. Could it not be charged to profit

(Testimony of William E. Veazie.)

and loss against the company?

A. I could not state that.

Q. It is not really a company loss, in your judgment?

A. Well, it is a custom that prevails in all steamship companies.

Q. What is the usual amount that is lost?

A. Well, it varies.

Q. Is not this an unusually large amount?

A. It is an unusual amount.

Q. What is the usual amount?

A. I should judge five or $6.00.

Q. Just taken away by the passengers for souvenirs and the like?

A. Yes, for souvenirs, and for medicine, and one *this* and another.

Q. How do you happen to remember so distinctly what Mr. Schmidt told you, and that you had these articles repaired, why do you remember this so carefully?

A. If you are skilled in that line you would remember a thing once in awhile. We don't change stewards only occasionally; we don't change stewards every trip.

Q. But they make inventories, do they, and report whether the silverware is all right?

A. According to the equipment-book, yes, sir.

[Testimony of Alexander Muir, for Respondent.]

ALEXANDER MUIR, called for the respondent, sworn.

Mr. HEGGERTY.—Q. What is your occupation?

A. Assistant to Mr. Veazie. **[43]**

Q. How long have you held that position?

A. Two years.

Q. Are you acquainted with Mr. Schmidt?

A. As chief steward.

Q. Sailing from San Francisco on the last round voyage of the "Sidney" on which she returned to this port, did you have anything to do with going over the equipment of the stewards' department with Mr. Schmidt? A. I did not.

Q. Did you upon his return from that voyage?

A. I did.

Q. That was in October, was it, or was it in September? A. I believe so.

Q. Where was the ship lying at the time that you and Mr. Schmidt had something to do on board?

A. Pier 17, Folsom Street Dock.

Q. Will you state fully to the Court what you and Mr. Schmidt did with respect to the equipment of the steward's department?

A. The day after the arrival of a ship—on the day of arrival there is quite a lot to do in getting out the linen, we leave them that day and ask them the following day to put out the crockery, the glassware, the silver and the linen. I take the equipment-book and go over the silver and count the articles

(Testimony of Alexander Muir.)

with the chief steward. I draw his attention to any discrepancy if it is very large, as in this case, I say, "Try and dig them up, look around; we won't put in bills until to-morrow." Mr. Schmidt said, "All right, I will look around." He called me back in the afternoon and he said, "I found those." I said, "I am glad of it." He took me into the pantry and counted them out. I said, "Now take it all out again so as to make sure of it, and he said, "It is just as I left it." Still I found the five short.

Q. Those are the five large deep vegetable dishes?

A. Exactly.

Q. Did you furnish a memorandum of those to the chief steward? A. The port steward. [44]

Q. I mean the port steward.

Mr. RYAN.—We will admit that these articles were short when they returned from the voyage.

Mr. HEGGERTY.—And about the values as stated.

Q. The values of these articles are the values stated on the memorandum, or about that?

A. That is correct.

Q. What further did Mr. Schmidt do then with respect to trying to find those articles?

A. Looked around the ship and he thought he had found them.

Q. But he did not find them?

A. No; it was a miscount on his part when I rechecked.

Q. How many of those dishes are there on the ship?

(Testimony of Alexander Muir.)

A. Twenty-five with covers; that would make 50. He gave me 45 pieces. Mr. Schmidt believed that he had them, because he said he had had quite a lot of trouble with his crew down the coast and he put it down to spite work.

Q. Did Mr. Schmidt say to you he did not have them going out?

A. No. He could not have said so when he said he found them; he must have acknowledged having them when he said he found them.

Q. Well, do you know anything more about the matter? A. Nothing whatever.

Cross-examination.

Mr. RYAN.—Q. How many pieces of silver-ware are there in the Commissary department, other than the knives and forks and spoons?

A. Oh, I have 17 ships to take stock of, and I would not give it generally, I would not make any statement as to the number.

Q. You say there were 50 covered vegetable dishes?

A. Yes.

Q. There are also uncovered dishes? A. Yes.

Q. And also large soup-tureens and vegetable dishes and cake-plates?

A. I gain that information because I have the equipment-book before me. [45]

Q. But generally there are several hundred large pieces of silverware on the vessel?

A. The ship is fully equipped.

Q. I say there are generally several hundred large

(Testimony of Alexander Muir.)

pieces of silverware on a vessel?

A. There is full equipment on each vessel.

Q. Mr. Schmidt did not say that he had those articles that were short, did he,—he merely said he would try to find them, did he not?

A. When he called me back he said he had them.

Q. I mean before that; when they were found short, did he tell you that he had had those articles on that voyage, or did he merely say he would try to find them?

A. No, he made no statement; he recognized they were short, presuming he had them when he left on board, otherwise he would not have got busy looking for them.

Q. After he looked for them, he thought he found them, but he did not remember the numbers—is that right? A. He had a book there.

Q. Why did he say he found them?

A. I don't know why; he will answer you that. All I know is he said he found them.

Q. What did he actually find?

The COURT.—Five that he had seen before. He said they had counted and found 45, and that Mr. Schmidt said he had found the five missing ones and they counted them again and still found them to be 45. He testified to that before.

Mr. RYAN.—That is all.

Mr. HEGGERTY.—We introduce the articles issued from the Shipping Commissioner's office for that round voyage, and read the following:

[Excerpt from Shipping Articles.]

"And the said crew agree to conduct themselves in an orderly [46] faithful, honest and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of said Master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and to the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to said crew as wages the amounts against their names respectively expressed and to supply them with provisions according to the foregoing scale; and it is hereby agreed that any embezzlement or wilful or negligent destruction of any part of the vessel's cargo or stores shall be made good out of the wages of the person guilty of the same; and if any person enters himself as qualified for a duty which he proves himself incompetent to perform his wages shall be reduced in proportion to his incompetency."

Mr. RYAN.—Mr. Heggerty, do you contend that this steward was incompetent, or that he was guilty of any wilful destruction or embezzlement?

Mr. HEGGERTY.—We don't know how it was.

Mr. RYAN.—But you don't contend that, do you?

Mr. HEGGERTY.—Mr. Schmidt is not a thief or an embezzler.

Mr. RYAN.—Those three are the only exceptions.

Mr. HEGGERTY.—Yes.

The COURT.—The cause will be submitted, together with the exceptions.

[Endorsed:] Filed Nov. 22, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [47]

[Exhibit—Shipping Articles.]

[Title of Court and Cause.]

[Copy of Log of SS. "City of Sydney."]

UNITED STATES OF AMERICA.

ARTICLES OF AGREEMENT BETWEEN MASTER AND SEAMEN IN THE MERCHANT SERVICE OF THE UNITED STATES.

Required by Act of Congress, Title LIII, Revised Statutes of the United States.

Office of the U. S. Shipping Commissioner for the Port of San Francisco, Jul. 24, 1913.

IT IS AGREED between the Master and seaman, or mariners, of the S. S. City of Sydney, of New York of which J. C. Follette is at present Master, or whoever shall go for Master, now bound from the Port of (1) San Francisco, to ANCON, CANAL ZONE, and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in *San Francisco,* the United States, for a term of time not exceeding 6 calendar months. (2) * * * [52]

And the said crew agree to conduct themselves in an orderly, faithfully, honest, and sober manner, and to be at all times diligent in their respective duties,

and to be obedient to the lawful commands of the said Master, or of any persons who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the same Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is [54] also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that (4) "And it is also agreed that the Master has the option to transfer any and all of the within mentioned persons, members of the crew, to any other American, British or other foreign vessel bound to San Francisco, California, in the same capacity or as a passenger and at the same rate of wages for final discharge any time during the period of time called for by these shipping articles."

~~The authority of the Owner or Agent for the allotments mentioned within is in my possession ——— Shipping Commissioner or Consular Officer. This is to be signed if such an authority has been produced, and to be scored across in ink if it has not.~~

IN WITNESS WHEREOF the said parties have subscribed their names on the other side or sides hereof on the days against their respective signatures mentioned. Signed by J. C. Follett, Master, on the day of Jul. 24, 1913.

THESE COLUMNS TO BE FILLED UP AT THE END OF THE VOYAGE.

Date of Commencement of Voyage.	Port at Which Voyage Commenced.	Date of Termination of Voyage.	Port at Which Voyage Terminated.
		9–24 13	S F

Date of Delivery of Lists to Shipping Commissioner.

9–25–13 [55]

Signature of Seaman: 65 Ed. Schmidt.
Birthplace (After foreign birthplace insert* to indicate naturalized seamen): Germany.*
Age: 45.
Height: Feet, 5; inches, 5.
Description: Complexion, B; Hair, B.
Wages per Month: 100.
Wages per Run:
Amounts of Monthly Allotment or Times of Payment:
Allotment Payable to:
Time of Service: M.—D. ——.
Whole Amount Due:
Wages Due:
Place and Time of Entry: San Francisco, Jul. 24, 1913.
Time at Which to be on Board: 7 A. M., July 24, 1913.
In What Capacity: Steward.
Shipping Commissioner's Signature or Initials: Deputy.
Conduct and Qualifications: V. G.
Address of Wife or Next Kin: [59]
65

CERTIFICATE TO SHIPPING ARTICLES.

(Art. 130, Customs Regulations of 1908.)

DEPARTMENT OF COMMERCE AND LABOR.

BUREAU OF NAVIGATION.

Office of Collector of Customs,

Port of San Francisco, Jul. 24, 1913.

I Hereby Certify that these Shipping Articles are a true copy of the original this day produced to me in conformity with the provisions of Article 130 of Customs Regulations of 1908.

Given under my hand and seal of office this day of Jul. 24, 1913.

[Seal] N. S. FARLEY,

Dep. Collector. [62]

CERTIFICATE AS TO SHIPMENT OF SEAMEN.

Department of Commerce and Labor,

Bureau of Navigation.

Shipping Service.

State of California, Port of San Francisco.

On this day of Jul. 24, 1913, personally appeared before me, a Shipping Commissioner in and for the said port, J. C. Follette Master SS. City of Sydney, and the following named seaman:

1. J. C. Follette.

AND SUCH OTHERS WHOSE NAMES APPEAR OPPOSITE MY SIGNATURE.

Severally known to me to be the same persons who executed the instruments attached (shipping articles), who, each for himself, acknowledged to me that he has read or had heard read the same; that he was by me made acquainted with the conditions

thereof, and understood the same; and that, while sober, and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned.

[Seal] LEIGHTON ROBINSON,
U. S. Shipping Commissioner, Deputy. **[63]**

[Title of Court and Cause.]

Opinion.

JAMES W. RYAN, Proctor for Libelant.
KNIGHT & HEGGERTY, Proctors for Respondent.

LIBEL FOR WAGES OF SEAMAN.

Libelant shipped as chief steward, on respondent's steamship "City of Sidney," in July for round-trip voyage from San Francisco to Balboa. The voyage ended in September, and on September 24th libelant received from the Shipping Commissioner all of his wages therefor.

The "City of Sidney" makes regular trips between these ports, and while in San Francisco, during the time this controversy arose, was engaged in discharging freight brought in, and loading freight for the next trip. It is the custom for the employees to remain on duty while in port unless they receive notice of discharge from such employment, and to sign Articles for the next trip on the day preceding the next sailing day. While in port they receive what is known as port pay, that is to say, their regular wages plus one dollar per day for victualing, as no meals are served on the vessel during her stay. Following this custom libelant, having received no notice of discharge, remained in the service of respondent

while the "City of Sidney" was [72] discharging and receiving freight for its next trip, from September 25th to October 1st, inclusive. Upon October 1st he was told that his services would not longer be required. Upon demanding his wages for this service in port he was informed that while his wages amounted to $30.33, he could not receive them, because of the loss of certain silverware entrusted to him as chief steward when he shipped in July and not accounted for by him at the end of the trip on September 24th, or thereafter, and amounting in value to $32.90, which sum respondent claimed the right to offset against his wages of $30.33, earned while in port. This setoff is pleaded as a defense and libelant interposed exceptions thereto on the ground that it did not arise out of the same contract as that upon which the suit was brought; that if entitled to offset this loss at all, respondent should have done so at the time the libelant received his wages on September 24th at the end of the voyage for which he shipped, and that the employment of libelant while in port was under a new contract beginning at the time he signed off at the end of the voyage.

The rule is well settled that in the admiralty court a setoff to be allowed must grow out of the same transaction as that which must be proven to support the libel. But it seems to me that as there was but one contract of hiring here, that is to say, the contract entered into in July when libelant shipped as chief steward, and as he would have to prove this contract in order to claim that he continued in the employ of

respondent after receiving his wages and signing off on September 24th, by reason of the custom before mentioned, the matters set up are sufficiently connected with the contract upon which he relies to constitute, if sustained, a proper setoff, and for that reason the exceptions to the special defense are overruled. But I cannot agree with respondent's contention that under the facts of the case here the setoff should [73] be allowed. And this for at least two reasons. There is no proof in the first place that libelant ever received into his charge the articles mentioned. Libelant testifies that no inventory was made, and that he does not know whether the articles were on the vessel when he took charge or not. The only other testimony is that of the port steward who says that he told libelant when he put him in charge to make an inventory and check it up with the equipment book, and that he later asked him how he found things to which he replied: "Everything is all right." This is not sufficient to establish the receipt of the articles by libelant. The other serious reason militating against the allowance of the setoff claimed is that it would make the chief steward under an ordinary contract of employment an insurer of all articles entrusted to him. There is no suggestion or proof here of negligence, and I am not prepared to concede that even were it clearly shown that the articles were entrusted to the libelant, the mere fact that they were not on the vessel after a two months' voyage would render him responsible for their loss. Nor do I believe that such a claim, where respondent did not check up the articles entrusted to

the libelant before the voyage, and offered no suggestion or proof of negligence on his part, but undertook to hold him to the responsibility of an insurer, furnishes the sufficient cause required by Section 4529 to relieve respondent from the penalties in that section provided.

A decree will, therefore, be entered for libelant as prayed for.

October 29th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 29, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [74]

[Title of Court and Cause.]

Final Decree Overruling Exceptions of Libelant to Answer, and Granting Libelant Relief as Prayed for in Libel.

At a stated term of the District Court of the United States of America, in and for the Northern District of California, held at the City and County of San Francisco, in said District, in the courtroom of said Court in the United States courthouse and Postoffice Building, on Wednesday, the 29th day of October, Nineteen Hundred and Thirteen; present, the Honorable MAURICE T. DOOLING, United States District Judge.

This cause having come on regularly to be heard by the Court upon the libel of libelant herein, and the answer thereto of the respondent Pacific Mail Steamship Company, a corporation, and the exceptions of

libelant to said answer; and James W. Ryan, Esquire, proctor and advocate for libelant, and Charles J. Heggerty, Esquire, proctor and advocate for respondent, having been heard on the issues raised by said exceptions; and the said exceptions having been submitted to the Court for its determination;

And the Court having thereupon heard the testimony and proofs of the respective parties, the cause having been tried on its merits; and the said proctors and advocates having been heard on [75] the issues raised by said libel, answer, testimony and proofs; and the said cause having been submitted to the Court for its determination;

And due deliberation having been had, and the Court having rendered and filed herein its opinion in writing, wherein and whereby it finds that the exceptions of libelant to said answer are not well-founded; and wherein and whereby it finds that all the allegations of the libel herein are true, and that the proofs introduced by respondent to support the special defense or setoff set forth in the answer herein are insufficient as a defense to said libel;

And the Court having ordered that a decree be made and entered herein overruling the exceptions of libelant to said answer;

And the Court having further ordered that a decree be made and entered herein in favor of libelant and against the respondent as prayed for in said libel;

NOW, THEREFORE, by reason of the premises, IT IS HEREBY ORDERED ADJUDGED, AND

DECREED, that the exceptions of libelant to said answer be overruled;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said libelant, Ed. Schmidt, do have and recover from the respondent Pacific Mail Steamship Company, a corporation, the sum of one hundred and fifty-one and 59/100 dollars ($151.59), with legal interest thereon from the date hereof, with libelant's costs of suit, taxed at thirty-six and 25/100 dollars ($36.25);

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the said sums may be paid to James W. Ryan, Esquire, proctor for libelant, and that said proctor may enter complete satisfaction of this decree upon payment to him of the said sums hereinbefore specified: **[76]**

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, unless this decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this Court, the libelant have execution against respondent, Pacific Mail Steamship Company, a corporation, to enforce satisfaction of this decree, or of so much thereof as shall remain unsettled.

Dated November 5th, 1913.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Nov. 5, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[77]**

[Title of Court and Cause.]

Proctor's Fee and Cost Bill.

Proctor's fee	$20.00
Clerk's costs	16.10
Marshal's fee for serving citation	2.00
Commissioner's fee for certifying to verification of libel	.25
Total	$38.35

JAMES W. RYAN,
Proctor for Libelant.

The above fee and cost bill is correct, and respondent hereby agrees to its taxation in the amount above stated.

KNIGHT & HEGGERTY,
Proctors for Respondent.

The costs in the above-entitled cause are hereby taxed in the sum of thirty-eight and 35/100 dollars ($38.35).

W. B. MALING,
Clerk.
C. W. Calbreath,
Deputy Clerk U. S. District Court Northern District of California.

[Endorsed]: Filed Nov. 5, 1913. W. B. Maling, Clerk. By. C. W. Calbreath, Deputy Clerk. [78]

[Title of Court and Cause.]

Notice of Appeal.

To Honorable WALTER B. MALING, Clerk of the United States District Court, to ED SCHMIDT, Libellant in the above-entitled cause, and to JAMES W. RYAN, Esquire, Proctor for the Libellant:

You are and each of you are hereby notified that the Pacific Mail Steamship Company, the respondent in the above-entitled cause, intends to and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree of the District Court of the United States for the Northern District of California, First Division, made and entered in said cause on November 5th, 1913, and from each and every part thereof, and from the whole of said Decree; and you are hereby further notified that the said Respondent intends to introduce new proofs in said Appeal.

Dated San Francisco, November 14th, 1913.

KNIGHT & HEGGERTY,
Proctors for the Respondent. **[79]**

Receipt of a copy of the within Notice of Appeal is hereby admitted this 14th day of November, 1913.

JAMES W. RYAN,
Proctor for Libellant.

[Endorsed]: Filed Nov. 14, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[80]**

[Title of Court and Cause.]

Assignments of Error.

Now comes the Pacific Mail Steamship Company, respondent in the above-entitled cause, and assigns the following errors of the above-named Court in said cause, to wit:

1. The Court erred in finding in the Final Decree and in its Opinion, and in finding at all that all of the allegations of the Libel are true; and in finding that the allegations of Article I of the Libel are true; and in finding that the allegations of Article II of the Libel are true.

2. The Court erred in finding and adjudging that in September, 1913, Libellant was hired at the port of San Francisco, or at all, to serve as chief steward on board the "City of Sydney," for part of a voyage from the port of Balboa to the port of San Francisco, and for a part of a voyage from the port of San Francisco to the port of Balboa, at $100 per month wages and $1 per day allowance for victualling money, and in finding and adjudging that in pursuance of such or any such agreement libellant entered the service of Respondent as chief steward on board said "City of Sydney" in the forenoon of September 25, 1913, or at [81] any other time or at all.

3. The Court erred in finding that said "City of Sydney" having taken libellant on as chief steward, discharged her cargo, and made freight and completed her voyage from Balboa to San Francisco; and immediately or at all began taking and con-

tinued to take on board a cargo for a voyage from San Francisco to Balboa with libellant on board as chief steward.

4. The Court erred in finding and adjudging that libellant, at any time after said "City of Sydney" returned from her round voyage to Balboa and tied up at her dock in San Francisco with libellant on board as chief steward under the Shipping Articles for said round voyage and was paid off and discharged under said Articles as such chief steward ever was chief steward or *hired employed* as chief steward on said vessel or was a seaman on said vessel or a member of any crew or the crew of said vessel or that said vessel had any crew of which libellant was a member or any part.

5. The Court erred in finding and adjudging that on the evening of October 1, 1913, *or at ever at* all, respondent without any cause or at all turned libellant on shore and would not permit him to perform any part of the remainder of said voyage, and that there was any remainder of any voyage upon which libellant was hired or had served as chief steward or as a seaman or as a member of the crew or a crew of said vessel.

6. That the Court erred in finding and adjudging that the round voyage of said vessel did not terminate on September 24, 1913, and that any voyage had commenced or that there was any other voyage of said vessel commenced until after October 1, 1913, and until after libellant was discharged from the service of respondent on October 1, 1913.

7. The Court erred in finding and adjudging that libellant was during the period of time from and including [82] September 25, 1913, to and including October 1, 1913, a seaman upon or a member of the or any crew of said "City of Sydney," or employed or hired as a seaman or as a member of the crew or a crew or as chief steward of said vessel, upon or for any voyage or part of any voyage or at all, and in finding and adjudging that libellant rendered any service as a seaman or earned seaman's wages, or was entitled to or earned or should be paid any seaman's wages or any wages as a seaman.

8. The Court erred in finding and adjudging that there was due and unpaid to libellant any seaman's wages or any wages as a seaman or that he earned any wages as a seaman for the services rendered by libellant to respondent after September 24th, 1913, and after he was paid off and discharged as chief steward under the shipping articles on the round voyage terminating at the port of San Francisco on September 24, 1913; and in finding and adjudging that libellant was ever employed or hired as a seaman on or to perform services on, or that he did serve or perform services on said vessel as a seaman or earn seaman's wages upon said vessel after he was paid off and discharged under said shipping articles.

9. The Court erred in finding and adjudging that during the whole time libellant was on board said vessel he well and faithfully performed his duty as such chief steward, or became entitled to demand on the evening of the 1st of October, 1913, ⅓ of his

wages or of the wages earned by him over and above all just deductions, or to the balance thereof on the evening of October 5, 1913.

10. The Court erred in finding and adjudging that said cause or the hiring or employment or discharge of libellant or the services or pay for the services performed by libellant after said vessel terminated her round voyage and he was paid off and discharged under the shipping articles, was or were within the [83] admiralty and maritime jurisdiction of the United States and of said District Court.

11. The Court erred in finding that libellant was entitled to and in ordering that a Decree be made and entered in favor of libellant and against respondent as prayed for in the libel.

12. The Court erred in finding, ordering, adjudging and decreeing that the libellant have and recover from respondent $151.59, with legal interest thereon from date of said Decree, and his costs taxed at $36.25.

13. The Court erred in finding and adjudging that libellant was not liable for the value or *of* to turn over and deliver to respondent at the termination of the said round voyage on September 24, 1913, the several articles of personal property enumerated and described in the answer of respondent, and that the value of such articles should not be and that respondent was not entitled to set off the value of such articles against the wages earned by libellant while on shore duty and while said vessel was tied up to her dock and after said round voyage on which he

had signed shipping articles had terminated and he had been paid off and discharged as chief steward under said articles; and in finding and adjudging that the reason for not paying libellant his wages from September 24th to October 2d, 1913, and the claim of respondent that libellant should deliver said articles to it or make good or pay the value of the same and that respondent was entitled to offset against the wages earned by him after said voyage and while he was on shore pay and duty and said vessel was in port, the value of said articles, did not furnish or constitute the sufficient cause required by Section 4529, Revised Statutes, to relieve respondent from the penalties in that section provided; and in finding and adjudging that respondent or said [84] vessel was making any coasting or any voyage during the time and during the period of time that said libellant was rendering to or performing services for respondent after he had been paid off and discharged on the termination of said round voyage; and in finding and adjudging that the evidence was not sufficient to establish the receipt of said articles by libellant, and that there was no proof that libellant ever received these articles into his charge and that libellant did not know whether said articles were on the vessel when he took charge or not, and that no inventory was made, and that there was no suggestion or proof of negligence of libellant; and that libellant would not be responsible for the loss of said articles even if it were clearly shown that they were entrusted to him, and that libellant was not liable as

an insurer; and that the set off should not be allowed and was not sustained by the proof.

14. The Court erred in finding and adjudging that there was but one contract of hiring between the libellant and respondent and that that contract and that hiring was the contract entered into in July, 1913, when libellant shipped as chief steward; and in finding and adjudging that respondent was liable to pay to libellant and that libellant earned and was entitled to receive and be paid seaman's wages and wages as a seaman under said shipping articles upon which he had been paid off and discharged, and when he had not signed or shipped for any other voyage under any other or new shipping articles; and the Court erred in not finding and adjudging that respondent was entitled to offset the value of said articles against libellant.

15. The Court erred in finding and adjudging that the libellant or the respondent or the cause of libellant by reason of or because of his said services after having been paid off and discharged under and from said articles, or in respect of said [85] wages or his wages therefor, was under or included within or governed or affected by said section 4529 Revised Statutes, or that the provisions thereof applied to or governed libellant or his services or his wages or the respondent in relation to the services and wages or payment for the services of libellant between September 24, 1913, and October 2, 1913.

16. The Court erred in holding, finding and adjudging that said section 4529, Revised Statutes, applies to or governs or affects the respondent under

the facts of this cause, or to the facts of this cause, or to the libellant or his said services or wages while said vessel is in port and libellant on shore pay and shore duty.

17. The Court erred in finding and adjudging that libellant was entitled to have and recover from respondent the sum of $151.59, and costs.

18. The Court erred in not dismissing said cause and awarding costs to the respondent.

19. The Court erred in retaining jurisdiction of said cause, and in finding and adjudging that the same was within the admiralty and maritime jurisdiction of this Court, and that libellant was a seaman on said vessel and that his said wages were seaman's wages.

WHEREFORE, and by reason of the foregoing errors, the respondent prays that said Decree be reversed and corrected, that said action be dismissed, and that respondent recover its costs and for such other order and relief as may be conformable to justice.

Dated: San Francisco, November 17th, 1913.

KNIGHT & HEGGERTY,

Proctors for the Above-named Respondent, the Pacific Mail Steamship Company. [86]

Due service and receipt of a copy of the within Assignments of Error is hereby admitted this 18th day of November, 1913.

JAMES W. RYAN,

Proctor for Libellant.

[Endorsed]: Filed Nov. 18, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [87]

[Title of Court and Cause.]

Citation on Appeal (Copy).

United States of America, Ninth Circuit,
Northern District of California,—ss.

The President of the United States, to Ed Schmidt, Libellant, Above Named, and to James W. Ryan, Esq., his Proctor, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, State of California, within thirty (30) days from and after the day this Citation bears date, pursuant to an Appeal filed in the office of the clerk of the United States District Court for the Northern District of California, in the above-entitled cause, wherein the Pacific Mail Steamship Company is appellant and you are libellant and appellee, to show cause, if any there be, why the Decree made, entered and rendered in the above-entitled cause on the 5th day of November, 1913, against the Pacific Mail Steamship Company said respondent, as in said appeal mentioned, [88] and thereby appealed from, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the

United States, this 15 day of November, 1913.

M. T. DOOLING,

Judge of the United States District Court for the Northern District of California.

Attest: W. B. MALING,

Clerk.

C. W. Calbreath,

Deputy Clerk of said District Court.

Service and receipt of a copy of the within Citation is hereby admitted this 15th day of November, 1913.

JAMES W. RYAN,

Proctor for Libellant and Appellee.

[Endorsed]: Filed Nov. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [89]

Certificate of Clerk U. S. District Court to Apostles.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed pages, numbered from 1 to 89, inclusive, contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled Ed. Schmidt, Libelant, vs. The Pacific Mail Steamship Company, Respondent, numbered 15,483, and which said Transcript of Appeal is made up pursuant to, and in accordance with "Praecipe for Apostles on Appeal" (copy of which is embodied in said Transcript), and the instructions of Messrs Knight and Heggerty, Proctors for Respondent and Appellant.

I further certify that the cost of preparing and certifying the foregoing Transcript of Appeals is the sum of Forty-five Dollars and Seventy Cents ($45.70), and that the said sum has been paid to me, by proctors for appellants herein.

I further certify that the original Citation on Appeal issued in the above-entitled cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court, this 20th day of December A. D. 1913.

[Seal] W. B. MALING,
Clerk.
By Lyle S. Morris,
Deputy Clerk. [90]

[Title of Court and Cause.]

Citation on Appeal (Original).

United States of America, Ninth Circuit,
Northern District of California,—ss.

The President of the United States to Ed Schmidt, Libellant Above Named, and to James W. Ryan, Esq., His Proctor, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty (30) days from and after the day this Citation bears date, pursuant to an Appeal filed in the office of the Clerk of the United States District

Court for the Northern District of California, in the above-entitled cause, wherein the Pacific Mail Steamship Company is appellant, and you are libellant and appellee, to show cause, if any there be, why the Decree made, entered and rendered in the above-entitled **[91]** cause on the 5th day of November, 1913, against the Pacific Mail Steamship Company, said respondent, as in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 15 day of November, 1913.

M. T. DOOLING,

Judge of the United States District Court for the Northern District of California.

Attest: W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk of said District Court. **[92]**

Service and receipt of a copy of the within Citation is hereby admitted this 15th day of November, 1913.

JAMES W. RYAN,

Proctor for Libellant and Appellee.

[Endorsed]: No. 15,483. District Court of the United States, Northern District of California. In Admiralty. Ed Schmidt, Libellant, vs. Pacific Mail Steamship Company, Respondent. Citation. Filed Nov. 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[94]**

[Endorsed]: No. 2352. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Mail Steamship Company, a Corporation, Appellant, vs. Ed. Schmidt, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

Received and filed December 20, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[Order Extending Time to December 22, 1913, to File Transcript of Apostles in Appellate Court.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PACIFIC MAIL STEAMSHIP COMPANY,

Respondent and Appellant,

vs.

ED. SCHMIDT,

Libelant and Appellee.

Upon motion of Chas. J. Heggerty, Esquire, proctor for respondent and appellant herein, and in view of the written consent hereinafter set forth of James W. Ryan, Esquire, proctor for libelant and appellee, it appearing that the appellant herein desires further time in which to file the Transcript of Appeal in the above-entitled matter, in the above-entitled court.

It is hereby ordered that said appellant have to and including the 22d day of December, A. D. 1913, in which to file in the above-entitled court the Transcript of Appeal in the above-entitled matter.

M. T. DOOLING,
Judge.

Dated December 15th, 1913.

I hereby consent that the time in which the appellant may file Transcript of Appeal in the above-entitled matter may be extended as set forth in the above order.

JAMES W. RYAN,
Proctor for Libelant and Appellee.

[Endorsed]: No. 2352. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 22, 1913, to File Record thereof and to docket case. Filed Dec. 16, 1913. F. D. Monckton, Clerk. Refiled Dec. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

No. ——.

ED SCHMIDT,
Libellant,

vs.

PACIFIC MAIL STEAMSHIP COMPANY,
Respondent.

Stipulation and Order for Omission of Certain Portions of the Record from the Printed Apostles.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the Clerk of the above-entitled court when printing the Apostles on Appeal herein shall only print and include in the printed Apostles the following portions of the Shipping Articles, viz:

1. Commencing with the words *"United States of America,"* on line 12, page 52, down to and including the words *"months,"* on line 26, page 52.

2. Commencing with the word *"And"* line 16, page 54, down to and including the figures *"9–25–13,"* line 31, page 55.

3. Commencing with the words *"Signature of Seaman,"* line 1, page 59, down to but *not* including the figures *"66,"* line 5, page 59.

4. Commencing with the words *"Certificate to Shipping Articles,"* line 1, page 62, down to and including the word *"Deputy"* line 17, page 63.

5. And that all of the remainder of the Shipping Articles shall be omitted from the printed Apostles.

IT IS FURTHER STIPULATED AND AGREED by and between the respective parties hereto that the clerk of the above-entitled court when printing the Apostles on Appeal herein may omit from the printed Apostles the title of court and cause wherever the same appear in the record *except* the title

of the court and cause of the Libel.

Dated December 22d, 1913.

KNIGHT & HEGGERTY,
Proctors for Appellant.
JAMES W. RYAN,
Proctor for Appellee.

It appearing that the above-mentioned portions of the Shipping Articles contained in the record are the only portions thereof material to be considered by the Court and that the remainder of the Shipping Articles contained in the record is immaterial to the Hearing of the Appeal,—

IT IS ORDERED that the record be filed by the Clerk as received, and the provisions of Rule 15 be relaxed accordingly.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 2352. Circuit Court of Appeals of the United States, Ninth Circuit. Ed Schmidt, Libellant, vs. Pacific Mail Steamship Company, Respondent. Stipulation for Omission of Portions of Record from Apostles. Filed Dec. 22, 1913. F. D. Monckton, Clerk.

No. 2352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MAIL STEAMSHIP COMPANY (a corporation),
Appellant,

vs.

ED. SCHMIDT,
Appellee.

BRIEF OF APPELLANT, PACIFIC MAIL STEAMSHIP COMPANY.

Statement of the Case.

This is an *appeal* from a *final* decree of the United States District Court for the Northern District of California. The appellee filed a libel *in personam* against the appellant to recover $30.22 and penalty under Section 4529, R. S., alleged to be *wages* due him for his *services performed* principally upon the steamship "City of Sydney", *while* that vessel was *lying at her dock* in this port, *after* her return from her *round* voyage *coastwise* from San Francisco and way ports to Balboa and return, and *before* she again sailed.

The appellee, on July 24, 1913, signed shipping *articles* as chief steward, the wages being $100 per month, *for that round* voyage terminating on September 23, 1913, at this port, and on September 23, 1913, the appellee was *paid in full* for his *sea* services on that round voyage and signed off the articles before the United States Shipping Commissioner at this port.

The vessel *arrived* at this port on the termination of that round voyage on September 23, 1913, and while the vessel was *lying at her dock* discharging her cargo and loading cargo for her next voyage, the appellee was engaged in cleaning up his part of the ship and receiving her stores for that department for her next voyage, under the *customary* rule of the appellant while its vessels are in the *home port,* at what is known as *shore pay,* being the same rate per day as when at sea and $1 per day additional for victualing, *no meals* being served or cooked *on the vessel* and appellee *sleeping* ashore *while in port.*

An inventory was taken by appellant on the return of the vessel, and it was found that *silverware,* which had been placed in the custody of the appellee as chief steward for use on the round voyage, valued at $32.90 was *short* and not returned by the appellee, and for which he did not and would not account, and the appellant insisted that the appellee should *pay* for this *shortage* out of his shore pay; the appellee refused to pay for this shortage of silverware and appellant *discharged*

him on October 1, 1913, and asserted the legal right to *offset* the value of the silverware that was short against the amount due the appellee for his shore services, and for that reason refused to pay these *shore wages;* and the appellee then filed this libel.

THE LIBEL.

The *libel* states, in Article I, p. 5, that in September, 1913, at the port of San Francisco, the appellant *hired* Schmidt, the appellee, to serve as chief steward on its steamship "City of Sydney", *for part of a voyage from* the port of *Balboa to* the port of San Francisco, *and for part of a voyage from* the port of *San Francisco to* the port of Balboa, at the wages of $100 per month and an allowance of $1 per day for victualing money, and appellee entered into the service as such chief steward on board said steamship in the forenoon of *September 25,* 1913; in Article II, p. 5, that the steamship, having taken appellee on board as chief steward, *completed her voyage from Balboa to* San Francisco, and immediately began taking and continued to take cargo *for a voyage from San Francisco to* Balboa; in Article III, pp. 5, 6, that on evening of *October 1st,* 1913, after the steamship had taken on board part of her cargo for said voyage to Balboa, appellant discharged the appellee without cause or his consent, and refused to allow him to perform any part of the remainder of said voyage; in Article IV, p. 6, that appellee became

entitled on October 1st, 1913, to ⅓ of $10 wages then earned, and four days later, on October 5th, became entitled to $20.22, and that no part of those wages and victualing money has been paid appellee; in Article V, pp. 6, 7, that the premises are true and within the admiralty and maritime jurisdiction.

The *prayer* (p. 7) is for $30.22 wages and victualing money and $82.27 for *one day's pay* for every day since October 1st that payment and victualing has been delayed, and the same for every day from date of filing libel, with interest and costs; and this libel was filed October 20, 1913 (p. 8).

THE ANSWER.

The *answer* (pp. 11-16) *denies,* that appellant hired appellee (as alleged in Article I of that libel) *for part of a voyage* from Balboa *to San Francisco and for part of a voyage* from San Francisco *to Balboa* at $100 per month and $1 per day for victualing money, and that *under such agreement* appellee entered into service on September 25, 1913, but alleges appellee was paid in full for the round voyage and was employed on *shore wages* while the vessel was at her dock; denies, that the ship with appellee on board under such agreement (as alleged in Article II of the libel) *completed* her voyage from Balboa to San Francisco, and immediately began taking cargo for a voyage from San Francisco to Balboa, but alleges that appellee was paid in full, and the vessel had

no chief steward thereafter until she again sailed; denies, that appellee was turned on shore or discharged without cause and not permitted to perform the *remainder* of said voyage (as alleged in Article III of that libel), but alleges that after appellee was paid in full and signed off the articles he never was or rendered any services as chief steward, that appellee only performed and was only employed on *shore or port service on shore wages;* denies, that appellee while on board the vessel well and faithfully performed his duty as chief steward (as alleged in Article IV of the libel), or became or was entitled to sea pay or pay for services as chief steward, but alleges that appellee was paid in full for his services on the vessel as a member of the crew and as chief steward thereon, that he never signed articles again after the voyage terminated and the vessel docked, that he then went on shore duty and shore pay and earned wages amounting to $30.33 on the *port pay roll;* that while appellee was chief steward on the round voyage he received into his care and custody, possession and safe keeping as such chief steward *silverware* valued at $32.90, no part of which he ever returned, redelivered or accounted for to appellant and has persistently refused to account for the same or pay the value thereof, and that appellant has always been willing and offered to pay appellee his port pay and wages of $30.33 upon appellee *returning* said silverware or paying its value, and that said obligation of appellee to the appellant offsets and discharges

appellee's claim for wages; denies, that the cause of appellee to recover such port pay and shore wages is within the admiralty or maritime jurisdiction of the District Court (as alleged in Article V of the libel), and alleges that the services of appellee were not sea services or seaman's services, and that his demand and claim and his said services and wages do not constitute and are not a seaman's wages or a mariner's wages, and are not within the jurisdiction of a Court of Admiralty; and prays that the libel be dismissed.

EXCEPTIONS TO ANSWER.

The appellee filed *exceptions* (pp. 16-19), to the *fourth* article of the answer which states the facts of appellee's services and the *offset* against his wages for the value of the *shortage* of silverware; and the Court *overruled* the exceptions (pp. 19-20).

THE HEARING.

The *evidence* introduced upon the hearing was the following:

> Ed. Schmidt, the appellee, testified (pp. 20-41):
>
> Am 44 years old. Since October 1st I have done nothing; before that I had been chief steward on different boats, lately on the "City of Sydney". July, 1913, *I signed* shipping *articles* with respondent, and *returned* from that voyage on September 23d, *and was*

then paid on the 24th, by the shipping commissioner. The procedure after I returned from that voyage regarding receiving my money was, that *I got paid off* by the shipping commissioner *my wages due me for that voyage.* I was still chief steward on the boat and not notified I had been discharged for anything and I worked on board as chief steward. During the voyage the chief steward is simply the head of the commissary department, keeps the rooms clean, looks after the passengers and so on, look after his help and see that the work is done. After the ship arrives in port we clean ship, see that the stores are put on board for the next voyage, get the ship ready for sea for the next voyage. While the ship is in port we have no passengers on board, and while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage. I put in a requisition for supplies and deliver the requisition book to the port steward. The chief steward sees that it is put on board. The steward's or what we call the commissary department has 22 men, steward, steerage cooks, bakers, butchers and waiters. Generally the day after the ship arrives at the dock the seamen go before the shipping commissioner and receive their wages. One day before the vessel leaves the dock, leaving on the voyage the seamen go before the shipping commissioner and sign new articles. I employ the men under me, and the port steward of the company employs me; he employed me for the round voyage to Balboa and return to San Francisco in July, 1913.

Certain vegetable dishes, table forks, dessert spoons, knives, teaspoons and 12 messroom spoons are stated in the answer of the defendant to have been delivered to me. They were

not directly delivered to me; it was stated that the articles were on board the ship; they had not been counted out to me by other company officials. I did not see the statement of the articles in my department on board the ship before going to Balboa. I was employed as chief steward 2 days before the ship left. No inventory was taken in my presence before the ship left this port, and I did not sign any paper acknowledging the receipt of those articles. I counted the small articles, such as knives, forks, spoons and so on, and more or less there are always a few missing. I did not count the five vegetable dishes. I always have enough for my service; I never run short of any. The vegetable dishes particularly are in the pantry; the other articles in that ship are in the dining room, locked up in the locker. After the ship is at sea it is open all the time. Whoever uses them, waiters, and so forth, they help themselves to set the table. The passengers do not have access to the rooms where these articles are. They are placed on the table during meal times. If any of these articles were missing from the tables after meals I would not know it; it would not be reported to me.

Before the ship left on the voyage to Balboa, these articles, such as knives, forks and spoons, were in the dining room; all silver, ladle dishes, such as vegetable dishes, were in the pantry. Any one going on board the ship could have access to the room where these articles were. While the vessel was in port I performed my duties on board the ship. The only duties I would do on the dock would be commissary credits, such as wine or beer bottles to be delivered on the dock and count them out, and so forth. I remained on the vessel all the time; I could sleep there if I wanted to; my room is there.

After I had been paid by the shipping commissioner, I remained at the vessel at the same rate of pay and one dollar for meal money, because we don't cook on board the ship. Only officers are entitled to that. After the vessel arrived in San Francisco upon its return from Balboa, the vessel was discharging and receiving cargo during all the time, so far as I know, and the men were working on it all the time. The ship has regular sailing dates, a regular schedule. I have been a chief steward since 1910, and was a butcher before that, in the same employ two years. On the voyage to Balboa and return I was hired by the port steward on July 22d. I received my money from the shipping commissioner on September 24.

I remained on board until October 1st, at 5 p. m. On that day, at 4 o'clock, the port steward brought a man there to relieve me, stating that I was relieved from the ship; the time was up at 5 o'clock that night. I received a discharge paper from the Pacific Mail Steamship Company; it was addressed to me as chief steward, steamship "City of Sydney", and I destroyed it.

No part of the wages earned by me after the time the ship arrived at the dock here has been paid to me. I received no money at all for any work on the ship here, after it returned from Balboa.

The custom was, after a seaman had been paid by the shipping commissioner, if the company did not discharge him he would remain there and do the work of chief steward. When they got into port the men simply kept on work if they were not discharged. I employ men on the vessel while it is in port and before they sign shipping articles intending they shall go on a voyage. I employ the men during the time and when the time comes

the member is to sign shipping articles. On the same day, as a rule, when you sign shipping articles in port, before leaving you sign them and then you get your money from the purser of the ship, the wages for the time you are employed on the vessel in port. I know of no reason why they discharged me. I asked for my money as port steward from the company on October 2d. I went to the purser and asked him for the port pay due me, and the answer was that the auditor did not give him the money for me, and for me to see the auditor. I asked the auditor about it and he said that I owed $32.90 for silver missing on the ship, that my wages amounted to $30.30 and he cannot do anything for me.

As a rule there are always more or less knives, teaspoons or such things lost; it averages from $3 to $5 on a two months' trip. Such a thing as vegetable dishes, I never heard of any loss before.

CROSS-EXAMINATION.

When I went on the "Sydney" to perform the duties of chief steward, prior to sailing for Balboa, the port steward, Mr. Veazie, took me to the vessel. The other steward, Mr. Thurlow, was there at the time. I asked Thurlow I wanted to take stock of the silverware; he could not find the keys; after finding a bunch of keys none of them would fit the locker, none of them could open the locker. We went about other work. There never was a knife or fork taken out of the locker and counted on the table; in fact, I could not open them until the morning of leaving. The saloon boy had the keys; in fact, he could not open the drawer where the knives, forks and spoons were. I did not know how many vegetable dishes I had, whether 30 or 40 or 50, or what it was. There was no stock taken at all.

"Q. Did you see how many of those were there? A. No, sir.

Q. Why?

A. I didn't have time; I had lots of other things to do. I did not know what crew I had on board.

Q. And that was two days before sailing?

A. Yes, sir.

Q. Didn't you and Mr. Thurlow go over the property in the steward's department?

A. No, sir.

Q. Did not Mr. Veazie go over it with you?

A. No, sir.

Q. Nobody at all? A. Nobody.

Q. You simply went on without knowing what was there?

A. I went on cleaning the rooms and having everything ready, and taking in stores, which was the most important thing to do. I saw that the stores came on board the ship and that none got lost and put them in the different places where they belonged.

Q. That is, you had an equipment book where you entered down what you have?

A. That is during the voyage, for the stores.

Q. And when you start on the voyage, do you know what you have on hand?

A. After I got the bills for the stores, I had to have it to make out my bills of fare and see that things run all right, after I got the bills.

Q. Haven't you got an equipment book on the boat?

A. During the voyage; yes, sir.

Q. Didn't you go through that equipment book and go through the steward's department to see whether the different property marked on that was there, or not?

A. I go through it to know how much linen I have, and things I have, so I can run the boat, how many this and that and so on.

Q. Didn't you go through the culinary department?

A. Everything except the silver; I counted the knives, forks and spoons and small stuff once a week on the voyage. At Panama there is always a little more or less silver lost, knives and forks, but the big silver I didn't go through.

Q. You did not see that at all, or count it?

A. I seen it in the pantry.

Q. Did you bring back with you the same silver you took away?

A. To my knowledge.

Q. How do you know you brought back the same amount you took away?

A. As I said before, the silver in the pantry—the pantryman uses that, and that we put on the table, I always had sufficient, I never was short of any, I always had sufficient for the comfort of the passengers.

Q. Do you remember, before sailing on this voyage to Balboa and return, do you remember going to Mr. Veazie and telling him there were some things you could not find in the steward's department and in the culinary department, knives and forks and silver?

A. Before sailing?

Q. Yes, before sailing?

A. You say something I could not find?

Q. Yes, that you had gone over the equipment and you could not find certain things that were marked there as on board?

A. I don't remember.

Q. Do you remember Mr. Veazie telling you they were up at the stores and were being refitted or replated, and that they were subsequently sent on and you signed for them?

A. I don't remember.

Q. After you came back you took an inventory of the property in the steward's department, did you not?

A. The assistant port steward took it with me.

Q. And you were present? A. Yes, sir.

Q. That was Mr. Muir, was it? A. Yes.

Q. Do you remember finding any discrepancy in the amount that was on hand when you got back?

A. You mean any shortage?

Q. Yes.

A. According to the equipment book, I did.

Q. For instance, the vegetable dishes and these articles?

A. According to the equipment book, the company's equipment book, according to that; I did not know how much was on board. According to that they counted it out and it was short.

Q. You don't sleep on the boat, do you—you didn't while you were on board?

A. I can if I want to, but at that time I did not.

Q. And you don't eat on board? A. No.

Q. You are allowed one dollar a day in port for meals? A. Yes, sir.

Q. You refused to pay, did you not, for the amount of these different articles that Mr. Muir claimed, or that it was claimed by the company was short in the equipment of the steward's department? A. I did; yes, sir.

Q. And then, as I understand you, they refused to pay your port wages?

A. Yes, sir" (pp. 36-41).

William E. Veazie testified (pp. 41 to 49):

I am the port steward of the Pacific Mail Steamship Company. I remember the occasion of the "City of Sydney" sailing on the round voyage, preceding the last, with Mr. Schmidt as chief steward. I recommended his employment. I took him to the boat. We met there Mr. Thurlow, who was then the chief

steward of the "Sydney". I had my copy of the ship's equipment book there and I took that over with me and I told Mr. Thurlow to turn the silver over to Mr. Schmidt and after checking it up to let me know, and I left the book there. Later in the day or next morning I saw Mr. Schmidt and I asked him how was the silver, and he said it was all right, that there was some spoons short, and I said the spoons were short from the last voyage and they were being repaired from the general stores, and he would get them with a receipt to sign before sailing. He did get them. He stated to me that everything was all right, and I gave him this book to check up by. Mr. Schmidt was an old employee of the company for a long time in the steward's department.

CROSS-EXAMINATION.

Mr. Schmidt told me everything was all right. He was left with instructions to take an inventory of the silver, and the book was left there with the two stewards. He was supposed to take an inventory of all the silver in his department, the large silver and everything, you do on all ships when you make a change. It is certainly usual for a man to do that when he is employed 2 days before the vessel sails, and if it is only 1 day. He has other men doing the work around the ship. He only supervises. The silver is a very important item. It is his duty to go over the silver. You do not check the general stock, you only check the silver, if it is a short time that way, the large silver and the dishes and so on. I remember distinctly Mr. Schmidt told me it was all right. That is always a particular thing to look after, and I naturally wanted to know how it was coming out, and if there was a shortage to let me know, because we were

transferring one ship to another. Each steward that goes out tells me that his silverware is all right or not before he goes; and when they come back they count the silver out on the table. Mr. Schmidt was responsible for it. He had orders to check it with the old steward. The steward is personally responsible for it, it is in his possession, and he is to make any shortage good. It is a valuable article on the ship and he is supposed to use all diligence in taking care of it. The usual amount of loss is $5 or $6. We don't change stewards often, but only occasionally. They make inventories according to the equipment book.

ALEXANDER MUIR testified (pp. 49 to 54):

I have been assistant to Mr. Veazie for 2 years. I went over the equipment of the steward's department with Mr. Schmidt when the ship returned from her round voyage in September; the ship was lying at Folsom street dock, Pier 17. The day after the arrival of the ship I took the equipment book and go over the silver and count the articles with the chief steward, I draw his attention to any discrepancy if it is very large, as in this case. I say, "Try and dig them up, look around; we won't put in the bills until tomorrow." Mr. Schmidt said, "All right, I will look around." He called me back in the afternoon and he said, "I found those." I said, "I am glad of it." He took me into the pantry and counted them out. I said, "Now take it all out again so as to make sure of it," and he said, "It is just as I left it." Still I found the five short. These are five large, deep vegetable dishes.

Mr. RYAN. "We will admit that these articles were short when they returned from the voyage."

The WITNESS. The values are the values stated. Mr. Schmidt did not say he did not have those articles going out. But he did say he had found them; he must have acknowledged having them when he said he found them.

CROSS-EXAMINATION.

When Mr. Schmidt called me back he said he had them. He recognized they were short, presuming he had them when he left, otherwise he wouldn't have got busy looking for them. He had not found them; they were five that we had seen before.

SHIPPING ARTICLES.

The *shipping articles* signed by appellee for the *round* voyage from San Francisco to Balboa and return to San Francisco as the place of discharge will be found at pages 53 to 58, and show that they were signed July 24, 1913, for a voyage *from* San Francisco to Ancon, Canal Zone, *and back to* San Francisco as the *final port of discharge* (p. 54).

THE DECREE.

The District Court made its decree in favor of the appellee and against appellant for $151.59 wages, and costs.

ASSIGNMENTS OF ERROR.

1. The Court erred in finding in the final decree and in its opinion, and in finding at all that all

of the allegations of the libel are true; and in finding that the allegations of Article I of the libel are true; and in finding that the allegations of Article II of the libel are true.

2. The Court erred in finding and adjudging that in September, 1913, libellant was hired at the port of San Francisco, or at all, to serve as chief steward on board the "City of Sydney", for part of a voyage from the port of Balboa to the port of San Francisco, and for a part of a voyage from the port of San Francisco to the port of Balboa, at $100 per month wages and $1 per day allowance for victualing money, and in finding and adjudging that in pursuance of such or any such agreement libellant entered the service of respondent as chief steward on board said "City of Sydney" in the forenoon of September 25, 1913, or at any other time or at all.

3. The Court erred in finding that said "City of Sydney" having taken libellant on as chief steward, discharged her cargo, and made freight and completed her voyage from Balboa to San Francisco; and immediately or at all began taking and continued to take on board a cargo for a voyage from San Francisco to Balboa with libellant on board as chief steward.

4. The Court erred in finding and adjudging that libellant, at any time after said "City of Sydney" returned from her round voyage to Balboa and tied up at her dock in San Francisco with libellant on board as chief steward under the

Shipping Articles for said round voyage and was paid off and discharged under said articles as such chief steward, ever was chief steward or hired or employed as chief steward on said vessel or was a seaman on said vessel or a member of any crew or the crew of said vessel or that said vessel had any crew of which libellant was a member or any part.

5. The Court erred in finding and adjudging that on the evening of October 1, 1913, or at ever at all, respondent without any cause or at all turned libellant on shore and would not permit him to perform any part of the remainder of said voyage, and that there was any remainder of any voyage upon which libellant was hired or had served as chief steward or as a seaman or as a member of the crew or a crew of said vessel.

6. That the Court erred in finding and adjudging that the round voyage of said vessel did not terminate on September 24, 1913, and that any voyage had commenced or that there was any other voyage of said vessel commenced until after October 1, 1913, and until after libellant was discharged from the service of respondent on October 1, 1913.

7. The Court erred in finding and adjudging that libellant was during the period of time from and including September 25, 1913, to and including October 1, 1913, a seaman upon or a member of the or any crew of said "City of Sydney",

or employed or hired as a seaman or as a member of the crew or a crew or as chief steward of said vessel, upon or for any voyage or part of any voyage or at all, and in finding and adjudging that libellant rendered any service as a seaman or earned seaman's wages, or was entitled to or earned or should be paid any seaman's wages or any wages as a seaman.

8. The Court erred in finding and adjudging that there was due and unpaid to libellant any seaman's wages or any wages as a seaman or that he earned any wages as a seaman for the services rendered by libellant to respondent after September 24th, 1913, and after he was paid off and discharged as chief steward under the Shipping Articles on the round voyage terminating at the port of San Francisco on September 24, 1913; and in finding and adjudging that libellant was ever employed or hired as a seaman on or to perform services on, or that he did serve or perform services on said vessel as a seaman or earn seaman's wages upon said vessel after he was paid off and discharged under said Shipping Articles.

9. The Court erred in finding and adjudging that during the whole time libellant was on board said vessel he well and faithfully performed his duty as such chief steward, or became entitled to demand on the evening of the 1st of October, 1913, ⅓ of his wages or of the wages earned by him over and above all just deductions, or to the balance thereof on the evening of October 5, 1913.

10. The Court erred in finding and adjudging that said cause or the hiring or employment or discharge of libellant or the services or pay for the services performed by libellant after said vessel terminated her round voyage and he was paid off and discharged under the Shipping Articles, was or were within the admiralty and maritime jurisdiction of the United States and of said District Court.

11. The Court erred in finding that libellant was entitled to and in ordering that a decree be made and entered in favor of libellant and against respondent as prayed for in the libel.

12. The Court erred in finding, ordering, adjudging and decreeing that the libellant have and recover from respondent $151.59, with legal interest thereon from date of said decree, and his costs taxed at $36.25.

13. The Court erred in finding and adjudging that libellant was not liable for the value or of to turn over and deliver to respondent at the termination of the said round voyage on September 24, 1913, the several articles of personal property enumerated and described in the answer of respondent, and that the value of such articles should not be and that respondent was not entitled to set off the value of such articles against the wages earned by libellant while on shore duty and while said vessel was tied up to her dock and after said round voyage on which he had signed

Shipping Articles had terminated and he had been paid off and discharged as chief steward under said articles; and in finding and adjudging that the reason for not paying libellant his wages from September 24th to October 2d, 1913, and the claim of respondent that libellant should deliver said articles to it or make good or pay the value of the same and that respondent was entitled to offset against the wages earned by him after said voyage and while he was on shore pay and duty and said vessel was in port, the value of said articles, did not furnish or constitute the sufficient cause required by Section 4529, Revised Statutes, to relieve respondent from the penalties in that section provided; and in finding and adjudging that respondent or said vessel was making any coasting or any voyage during the time and during the period of time that said libellant was rendering to or performing services for respondent after he had been paid off and discharged on the termination of said round voyage; and in finding and adjudging that the evidence was not sufficient to establish the receipt of said articles by libellant, and that there was no proof that libellant ever received these articles into his charge and that libellant did not know whether said articles were on the vessel when he took charge or not and that no inventory was made, and that there was no suggestion or proof of negligence of libellant; and that libellant would not be responsible for the loss of said articles even if it were clearly shown

that they were entrusted to him, and that libellant was not liable as an insurer; and that the set-off should not be allowed and was not sustained by the proof.

14. The Court erred in finding and adjudging that there was but one contract of hiring between the libellant and respondent and that that contract and that hiring was the contract entered into in July, 1913, when libellant shipped as chief steward; and in finding and adjudging that respondent was liable to pay to libellant and that libellant earned and was entitled to receive and be paid seaman's wages and wages as a seaman under said Shipping Articles upon which he had been paid off and discharged, and when he had not signed or shipped for any other voyage under any other or new Shipping Articles; and the Court erred in not finding and adjudging that respondent was entitled to offset the value of said articles against libellant.

15. The Court erred in finding and adjudging that the libellant or the respondent or the cause of libellant by reason of or because of his said services after having been paid off and discharged under and from said articles, or in respect of said wage or his wages therefor, was under or included within or governed or affected by said Section 4529, Revised Statutes, or that the provisions thereof applied to or governed libellant or his services or his wages or the respondent in relation to the

services and wages or payment for the services of libellant between September 24, 1913, and October 2, 1913.

16. The Court erred in holding, finding and adjudging that said Section 4529, Revised Statutes, applies to or governs or affects the respondent under the facts of this cause, or to the facts of this cause, or to the libellant or his said services or wages while said vessel is in port and libellant on shore pay and shore duty.

17. The Court erred in finding and adjudging that libellant was entitled to have and recover from respondent the sum of $151.59, and costs.

18. The Court erred in not dismissing said cause and awarding costs to the respondent.

19. The Court erred in retaining jurisdiction of said cause, and in finding and adjudging that the same was within the admiralty and maritime jurisdiction of this Court, and that libellant was a seaman on said vessel and that his said wages were seaman's wages.

Points and Authorities.

I.

The appellee failed absolutely to prove the *case alleged* in his libel; the findings in the decree are absolutely contrary to the allegations of the libel and to the proofs, and *Assignment of Errors* Nos. 1,

2 and 3 (p. 66), must be sustained. The appellee was *not* employed and did not testify that he was employed, as alleged in Articles I, II and III of the libel, after the return of the ship or before that *for any part of a voyage,* at $100 per month wages; his libel is for breach of an *express* contract of hiring, and his proofs are of an *implied* contract or a *quantum meruit;* but the round voyage having terminated and appellee having been fully paid off under the Shipping Articles, the appellee remained in the employ of the appellant, on shore or port wages, and performing shore or port services.

SCHMIDT, appellee, testified, and the evidence proved, that he signed Shipping Articles on July 24, 1913, at San Francisco, as chief steward on the "City of Sydney" for a *round voyage* to Balboa and return to port of discharge, San Francisco, at wages of $100 per month; that the "City of Sydney" arrived at San Francisco on her return and terminated this round voyage for which appellee shipped, on September 23, 1913, and the *appellee was paid in full his wages* for that round voyage on September 24, 1913. That he was not detached and discharged from the ship at the termination of this round voyage, but continued cleaning up, making repairs and seeing that the stores are put on board for the next voyage, while the ship was discharging and loading cargo at her dock in port.

> "Q. What does the chief steward do *after* he arrives *in port?*

A. After he arrives here we *clean the ship.*

Q. Is your work while in port very similar to that while on the voyage?

A. Yes.

Q. What is the difference between your duties while on the voyage and while the ship is in port?

A. The difference is we have no passengers on board, while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage.

Q. Who places the provisions on board?

A. The chief steward—he sees that it is put on board.

Q. After you had been paid by the shipping commissioner you remained at the vessel at the same rate of pay?

A. At the same rate and one dollar for meal money because we don't cook on board the ship.

The COURT. He stated that he did remain on board because he had not been discharged, and he was performing the duties around there incident to the duties of a steward when employed.

Q. What was the custom, after a seaman had been paid by the shipping commissioner, as to whether or not they should remain in the service of the steamship?

A. The custom was if the company did not want to keep the man there, if they did not discharge him he would remain there and do the work of chief steward.

The COURT. He has told you, Mr. Ryan, he has told you that the custom was for the steamship company to discharge those they did not wish to re-employ.

The COURT. How were the men discharged when they got into port if they were not to be re-employed?

A. They simply kept on work.

Q. How long before the vessel leaves the dock do the seamen go before the shipping commissioner and sign new articles?

A. One day before leaving on that voyage.

Q. From whom do you receive your money for your wages from the time you are employed on the vessel *in port* or when you are held over in port, to the time when you sign Shipping Articles?

A. On the same day, as a rule, when you sign Shipping Articles in port, before leaving you sign them, and then you get your money from the purser of the ship.

Q. What did you do when you went to see them regarding your wages, to whom did you go?

A. I went to the purser of the ship, who pays off there on that day.

Q. What did you say to him?

A. I went there and *asked him for the port pay* due me and the answer was that the auditor did not give him the money for me and for me to see the auditor. I went and asked him about my wages due me and he answered me that I owed $32.90 for *silver missing* on the ship; that my wages amounted to $30.30, and he cannot do anything for me.

Q. You refused to pay, did you not, for the amount of these various articles that it was claimed by the company was short in the equipment of the steward's department?

A. I did, yes, sir.

Q. And then, as I understand you, they refused to pay your wages?

A. Yes, sir."

There is not any proof of the contract of employment and wages alleged in the libel and found to be true by the Court; and the Court did not

make any finding upon the only employment and the custom as to wages for services in port or a valuation of the services shown by the evidence.

We submit, that without an amendment to the libel or proof of the express contract and the services as alleged in the libel, the *decree* rendered could not be sustained. Appellant's answer denied the contract and services alleged, and the proof sustained the answer.

II.

The *set-off* proved by appellant, that the appellee was *short* and refused to account or pay for *silverware* placed in the custody, possession and safekeeping of the appellee for use in the steward's department, valued at $32.90, should have been sustained by the Court and the libel dismissed (Assignment of Error "13", p. 69).

The District Court in its *opinion* (p. 60) refused to allow this *set-off* for *two* reasons: first, that there was no proof that the appellee ever received into his charge the articles mentioned, and, second, that to allow the set-off would make the chief steward under an ordinary contract of employment an insurer of all articles entrusted to him.

The appellee testified, *not* that the "5 vegetable dishes, large *silver-plated*", valued at $27.50 and other silverware, were not *delivered* to him, but that

> "they were not *directly* delivered to me; it was stated that the articles were on board the

ship; they had not been *counted* out to me by other company officials" (p. 23).

But he did not testify that he did not receive them. He said:

"I did not *count* the five vegetable dishes; I always have enough for my service; I never run short of any. The *vegetable dishes* particularly are in the pantry; the *other* articles are locked up in the locker" (p. 24).

"Q. Before the ship left on the voyage to Balboa *were these* articles *on the ship?*

A. Such as knives, forks and spoons were in the dining room; *all silver, ladle dishes, such as vegetable dishes were in the pantry"* (p. 25).

"As a rule, there is always more or less knives, teaspoons or such things lost; it averages about from $3 to $5 on a two months' trip. Such a thing as vegetable dishes, I never heard of any loss before" (p. 34).

"The port steward, Mr. Veazie, took me to the vessel and we there met the other steward, Thurlow. I came on board the ship. I asked him, I wanted to take stock of the silverware; he could not find the keys to open the locker, and we went about other work. * * * I did not know how many vegetable dishes I had, whether 30 or 40 or 50, or what it was. There was no stock taken at all" (p. 36).

"The pantry is always open *where* the *silver* dishes are. They are on the shelves, open. Those are the silver-plated dishes. I did not see how many there were of those there, because I didn't have time" (p. 37).

"I have an equipment-book on the boat during the voyage.

Q. Don't you go through that equipment-book and go through the steward's department to see whether the different property marked on that was there or not?

A. I go through it to know how much linen I have and things I have, so I can run the boat, how many of this and that and so on.

Q. Didn't you go through the culinary department?

A. *Everything except the silver* * * * but the *big silver, I didn't* go through.

I seen it in the pantry" (p. 38).

"According to the equipment-book, I did find a shortage when I got back; according to the equipment-book, I did not know how much was on board; they counted it out and it was short" (p. 40).

So that, the appellee testified that he had an equipment-book on board with him, and he went through it and counted everything except the *big silver;* and on his return there was a shortage according to this equipment-book.

Mr. Veazie, the port steward, testified:

"That he took the appellee to the ship, and told Mr. Thurlow to turn the *silver* over to Mr. Schmidt and left his copy of the equipment-book with them, and told them after checking it up to let him know. Mr. Veazie saw Mr. Schmidt later and asked him how was the silver, *and he said it was all right,* that there were some spoons short, which were being repaired and later were turned over to Mr. Schmidt. He stated that everything was all right and I gave him this book to check up by. He was an old employee of the company in the steward's department" (pp. 42-43). He was left with instructions to take an inventory of the silver, and the book was left there with the two stewards. You always do this on all ships when you make a change. The *silver* is a very *important* item. It is *his duty*

to go over the silver (p. 44). You do not check the general stock, you only check the silver, if it is short in any way. That is always an important thing to look after, and I naturally wanted to know how it was coming out, and if there was any shortage to let me know, because we were transferring one ship to another (p. 45). The steward is personally responsible for it; it is in his possession; it is a valuable article on the ship, and he is supposed to use all diligence in taking care of it; somebody had to be held responsible for it, otherwise it would be pilfered (p. 47). We don't change stewards often. They make report whether the silverware is all right according to the equipment-book (p. 48).

Mr. Muir, assistant to Mr. Veazie, testified: The day after the arrival of the ship we take the equipment-book and go over the silver and count the articles with the chief steward. I draw his attention to the discrepancy if it is very large, as in this case, and say "try to dig them up, look around". Mr. Schmidt said, "All right, I will look around". He called me back in the afternoon and said, "I found these". He took me into the pantry and counted them out. I said, "Now take it all out again so as to make sure of it", and he said, "It is just as I left it". Still I found the five short, the five deep vegetable dishes (pp. 49-50). Mr. Schmidt believed he had them, because he said he had trouble with his crew down the coast, and he put it down to spite work. He never said to me that he did not have them going out (p. 51).

Proctor for appellee here stated:

"We will *admit* that these articles were *short* when they returned from the voyage. The values are correct" (p. 50).

The appellee did *not deny* any of this testimony of either Mr. Veazie or Mr. Muir; nor does he anywhere testify that he did not have these articles on board when he sailed that were short when he returned.

We submit that the evidence clearly proves that these articles, for the value of which appellant claimed the right to set off against appellee's wages, were in the custody and possession of the appellee when he sailed and were short when he returned; and that the setoff should have been allowed.

III.

The District Court erroneously decreed the appellant to be liable for and allowed appellee to recover, in addition to the wages of $30.33, the further sum of $121.26, as a *penalty* under Section 4529, Revised Statutes, being $1 per day for every day the wages were unpaid after October 1, 1913, to the date of the decree, November 5, 1913.

Section 4529, Revised Statutes, provides as follows:

> "The master or owner of any vessel *making coasting voyages* shall pay to every *seaman his wages* within two days after the *termination of the agreement under which he shipped,* or at the time *such seaman* is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours

after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases *the seaman* shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who *refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause* shall pay to *the seaman* a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court; but this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

First. Section 4529, Revised Statutes, does not apply to a case like the one at bar. It expressly relates to *"seamen", "shipped under an agreement",* that is, persons who ship, sign and serve as a member of the crew of a vessel *under Shipping Articles,* and to sea service, not to services performed by persons on vessels when they are in their port of final discharge either after the termination of the voyage or before the vessel sails upon her voyage.

The provisions of the Revised Statutes relating to seamen and seamen's wages are included in and in the sections between Sections 4501 and 4612, Revised Statutes, and each and all they deal with persons who ship on vessels as members of the crew, either under Shipping Articles signed before a United States Shipping Commissioner, or before the master of the vessel where there is no ship-

ping commissioner or where in certain trade and certain vessels the master is expressly permitted to act as his own shipping commissioner; and where seamen are required to sign articles before the United States Shipping Commissioner, severe penalties are imposed upon the vessel by Section 4514, Revised Statutes, for not doing so, and on the master by Section 4521, and by Section 4519, Revised Statutes, for not posting a copy of the Shipping Articles; and generally, by Section 4523, Revised Statutes, all shipments contrary to these provisions are made void, etc.

Wages of seamen are provided for in the sections commencing with Section 4524, Revised Statutes, when they commence and terminate, and in cases of improper discharge, time and manner of payment; and Section 4549, Revised States, fixing a *penalty* on the master and owner for payment or discharge except before a shipping commissioner.

From the time he signs the articles he becomes a member of the crew of the vessel.

The Ida Farren, 127 Fed. 766;
Tucker v. Alexandorff, 183 U. S. 424.

Second. The Federal Courts, in every case reported in the books, where this penalty has been claimed under Section 4529, Revised Statutes, have uniformly held that the penalty would not be imposed in any case where there was a fair ground of dispute, even though the reason for non-payment was not sustained; and that it could

only be properly imposed where the withholding and refusal to pay were without any just excuse.

Appellant pleaded this *set-off* in its answer to the libel (pp. 13-15); the appellee *excepted* to the part of the answer pleading this set-off (pp. 16-18); the Court *overruled* these exceptions (p. 19); and thereby, we submit, adjudged appellant's refusal to pay appellee his wages to be sufficient cause for not paying under Section 4529, Revised Statutes.

In The George W. Wells, 118 Federal, 761, 762, 763, the Court said:

> "It remains next to consider *if the libellants are entitled to the additional payment* provided for in Rev. St., Sec. 4529, as amended by Section 4, c. 28, Acts 1898; 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077). *Was the payment* of the wages *delayed 'without sufficient cause'?* That *the cause* of delay *was insufficient in law,* has just been determined, *but to construe the language thus narrowly is contrary to its reasonable intent.* Congress can hardly have intended that in every controversy, however doubtful which finally results in the seaman's favor, he shall be entitled to additional compensation so large. Let us suppose, for example, a disputed question of fact concerning wages, where the conduct of the sailor has been such that the court refuses him costs, though he finally prevails so far as to collect a small part of his original claim. Payment is delayed until the decree of the court, made a year or more after the claim accrued. Can it be that the court is absolutely compelled, either in the original suit or in one subsequent, to award the libellant a bonus of four or five hundred dollars in addition to the four or five dollars of his wages actually detained? I think

not. See The Ailee B. Phillips (D. C.), 106 Fed. 956; The Topsy (D. C.), 44 Fed. 631, construing Statutes 17 and 18 Vict. c. 104, Sec. 187. It is easy to perceive that the construction of the statute urged by the libellant would encourage seamen to speculate upon controversies between themselves and the ship. The phrase 'without *sufficient* cause' *should* rather *be construed as equivalent to* 'without *reasonable cause*'. In this sense there was reasonable cause in the case at bar for the delay in the payment."

In The Empress, 129 Federal, 655, 656, the Court said:

"The statute is a *penal* statute, intended to punish masters of vessels who, *without any just excuse, arbitrarily refuse to pay* seamen their wages when due."

In The St. Paul, 133 Federal, 1002, the Court said:

"The claimant, in my opinion, was justified in contesting its liability, and there should be no fines imposed under the statute imposing them for *unreasonable* delay in the payment of wages."

In The Sadie C. Sumner, 142 Federal, 611, 613, the Court said:

"Revised Statute, Section 4529, does not apply, as claimed in the libel, to such a case as this. There was *a fair question for controversy,* and therefore no refusal to pay without sufficient cause, within the meaning of that section. The George W. Wells, 118 Fed. 761; The Empress, 129 Fed. 655."

In The Sentinel, 152 Federal, 564, 566, the Court said:

> "Under the Peterson libel, the claimant shows reasonable grounds for disputing the claim, even if not able to make out a defense sufficient to prevent any recovery on the part of the libellant; and therefore the additional penal damages provided for in Section 4529 will not be allowed."

Also

> The Amazon, 144 Federal 153, 154.

The Court *sustained our answer* pleading this shortage of silverware as a *set-off* to the libel for wages, and *overruled* (pp. 16-19) the libellant's exceptions; thus *adjudging* in fact, in this case, that appellant had *sufficient* cause for refusing to pay the appellee his wages, under Section 4529, Revised Statutes.

THIRD. Section 4529, Revised Statutes, was taken from the "shipping commission" Act of June 7, 1872 (17 Stat. 262, C. 327), and was, so far as the vessel and wages here in question are concerned, *repealed* by the Act of June 9, 1874 (C. 260, 18 Stat. L. 64, 6 Fed. Stat. Ann. 850, U. S. Comp. St. 1901, p. 3064), which later Act provides:

> "That *none of the provisions* of an act entitled 'An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen' *shall apply to* sail or *steam vessels* engaged *in the*

> *coastwise trade, except* the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

In Wilson v. Manhattan Canning Co., 205 Federal 996, 997, the Court said that if Section 4527, Revised Statutes, includes cases other than those of wrongful discharge, *it is inapplicable to a coastwise voyage* of the nature of the one set up in the libel.

Also:

> The George B. Ferguson, 140 Federal 955, 956;
>
> The Elihu Thompson, 139 Federal 89;
>
> U. S. v. Smith, 95 U. S. 536.

Section 2447, Revised Statutes, provides for *shipping crews in the coastwise trade,* and *expressly* declares that

> *"such seamen shall be discharged and receive their wages* as provided by *the first clause* of Section 4529 (and the *penalty* for *not* paying is not found in the *first* clause but in the *second* clause of Section 4529), and 4526, 4527, 4528, 4530, 4536, 4542, 4545, 4546, 4547, 4549, 4550, 4551, 4552, 4553, 4554, and 4602, of the Revised Statutes; *but in all other respects* such shipment of seamen and such shipping *agreement* shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

The "City of Sydney" was engaged in the coastwise trade, as provided for by Section 2447, Revised Statutes, and *the first clause only* of Section 4529 is applicable thereto; and the appellee *never shipped or signed any agreement* either in the coastwise trade or at all, *after he returned* from the round voyage to Balboa on September 23, 1913, and *was paid* for that round voyage *in full* on September 24, before the United States Shipping Commissioner, *and signed off the articles.*

IV.

The District Court in its admiralty and maritime jurisdiction had no power to hear and determine this cause; the case is not within the admiralty and maritime jurisdiction of that Court; and the services of appellee were *not* a maritime service.

In the recent case of California-Atlantic S. S. Co. vs. Central Door & Lumber Co., 206 Federal 5, 10-11, this Court said:

> "So also, there is a line of cases which hold that the jurisdiction *in the Admiralty* of libels for *seamen's wages* for services rendered depends upon the question whether the services were substantially performed or to be performed upon the sea or navigable waters connected therewith. * * * No presumptions arise in favor of the jurisdiction of the federal Courts. Ex parte Smith, 94 U. S. 455, 24 L. Ed. 165. On the contrary, the legal presumption is that every case is without their jurisdiction unless the contrary affirmatively appeals."

This vessel, the "City of Sidney", was tied up to her dock at her home port discharging cargo on the termination of her round voyage and loading cargo for her next voyage. The appellee had been chief steward on the round voyage, and on its termination at this port on September 23, the appellee was paid his wages in full and discharged from the articles. The appellee continued upon the vessel, cleaning up and receiving the stores for the next voyage. Appellee was on shore pay, his services were shore services, and he had absolutely nothing to do with the navigation of the vessel in any way.

In The Sirius, 65 Federal 226, an action in admiralty for seamen's wages, for the services of a marine engineer upon a vessel that was not then engaged in navigation, Judge Morrow dismissed the libel, rendering an admirable and exhaustive opinion on the subject.

Also:

The Fortuna, 206 Federal 573;

The Sinaloa, 209 Federal 287.

"To justify a person employed on a vessel in suing in Admiralty, the service rendered must be essentially maritime."

1 Cyc. p. 832.

Services rendered in port putting in machinery in a vessel and as a fireman, were held to be not maritime services.

Walter v. The Kamchatker, 29 Fed. Cas. 17, 119;

Graham v. Hoskins, 10 Fed. Cas. 5, 669.

It is respectfully submitted, the decree appealed from should be reversed, the libel ordered dismissed, and the appellant should recover its costs.

Dated, February 20, 1914.

KNIGHT & HEGGERTY,
Proctors for Appellant,
Pacific Mail Steamship Company.

No. 2352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MAIL STEAMSHIP COMPANY (a corporation),
Appellant,

vs.

ED. SCHMIDT,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Appellant respectfully asks *a rehearing* of this cause, so far as and to the full extent that by the decree of the District Court on the trial and the decision and judgment of this Court on *its* appeal hold and adjudge appellant subject to and liable for the *penalty* imposed by the decree of the District Court under Section 4529, Revised Statutes, because appellant did not pay appellee's *shore* wages, and *further imposed* by this Court because

appellant did not statisfy that decree as to payment of the wages, but instead had appealed to this Court.

Appellant *will not* ask for a rehearing of that portion of the decree of the District Court or of the decision and judgment of this Court which adjudges the appellee entitled to the admitted amount of *shore* wages as against appellant's claim to set off against such wages the conceded value of silverware unaccounted for by appellee as chief steward of the "City of Sydney"; and appellant will file in this Court an application for an order of this court permitting appellant *to pay* the original wages of appellee, viz. $30.33, and the costs and proctor's fee into the registry of the District Court, or, to the proctor of the appellee, without prejudice to the prosecution of the appeal so far as and to the full extent that the decree of the district and the decision and judgment of this Court hold appellant subject to and liable for the *penalty* under Section 4529, Revised Statutes.

That the Court may notice with what good faith, diligence and speed we assisted the learned proctor for appellee in bringing the questions in dispute to decision and judgment, we call the attention of the Court to *these facts,* that appellee claims these wages were payable to him on *October 1, 1913;* that *his* libel was filed *October 20* (Tr. p. 8); that appellant *answered* within *five days,* on *October 25* (Tr. p. 16); that, although *appellee* excepted to our answer, on *October 27* (Tr. p. 19), the case was

tried and opinion rendered in appellee's favor on *October 29* (Tr. p. 19, and Tr. p. 61); *decree* filed *November 5* (Tr. p. 63); *appeal* taken *November 14* (Tr. p. 65); *all in one month;* so that, while the learned counsel for appellee does not even assert the contrary, this Court will see that appellant has done *no* act to *delay* payment or recovery of appellee's wages, except to assert in good faith upon reasonable grounds, its right to set off the shortage of silverware against his claim for shore wages.

GROUNDS UPON WHICH REHEARING IS ASKED.

First. In its opinion, this Court *agreed* with appellant upon the law, that Section 4529, Revised Statutes, expressly relates to "seamen shipped under an agreement"; the Court said:

> "It is first contended on behalf of the appellant that the section referred to expressly relates to seamen shipped under an agreement. *That is true.*"

And the Court then *mistakenly* states:

> "but the answer is, as has been above pointed out, that the libelant was a seaman and rendered *the services* for which he *libeled* the ship (a mistake, the libel was in personam) *under shipping articles* duly executed and *in force at the time* of the rendition of the service;"

the Court had previously said on the question of *jurisdiction:*

> "In the present case the vessel was in active service, the present libellant a regular seaman *under* shipping articles, *whose term* of service had *not expired* and who, while the ship was discharging her cargo preparatory to *another voyage,* was cleaning ship, storing supplies therein," etc;

while the *facts are,* upon libellant's own claim in his libel, in his *exceptions* to our answer, in his *evidence* upon the trial, from the shipping *articles* themselves, from the *opinion* of the district judge, from the *decree* itself, and in the *brief* of the learned counsel for appellee, that the shipping articles were for a round voyage which *expired* on September 24, 1913, on which day the appellee was paid his wages in full, including that day, and he signed off on September 24, and his term of service had expired; his own claim is for wages under the appellant's *custom* while its ships are *in port,* viz.: the same wages as when at sea *with the addition* of $1 per day *victualling* money; and appellee was *not* therefore, on September 25, 1913, and at the time these services were performed, "a seaman shipped under an agreement"—his agreement and term of service had expired and he had not shipped under another or any agreement. The transcript (p. 56) shows expressly *the part* of the shipping articles declaring the date of termination of the voyage, thus: "These columns to be filled up at the *end* of the voyage. Date of termination of voyage, 9-24-13 (meaning September 24, 1913). Port at which voyage terminated, S. F." (Tr. p. 56.)

Second. The Court having agreed with appellant that Section 4529, Revised Statutes, only and expressly applies to "seamen shipped under an agreement", *yet* the *opinion* of the Court seems to hold that the shipping *articles* were *in force* during the time appellee performed the services for which his libel seeks wages, viz.: September 25 to and including October 1, 1913, because the shipping articles provide for a *voyage,* "*from* the port of San Francisco *to* Ancon, Canal Zone, and such other ports and places in any part of the world as the master may direct, *and back to a final port of discharge in* San Francisco, the United States, *for a term of time not exceeding 6* calendar *months",* and, the opinion seems to hold that, as the articles were dated July 24, 1913, the services in port were within that *six* months, and therefore performed *under* the articles; this conclusion is erroneous not only for all reasons stated in the "first" ground, but also, because the words in the articles: "for a term of time not exceeding 6 calendar months", do not mean or constitute *a hiring for* six months, but only that the *voyage* shall not last beyond *six* months, and if it does the seaman can demand and is entitled to be sent to this port *for final discharge,* and when the ship returns to this port and the seaman is paid and signs off, that ends and terminates the agreement *in* the articles, and this happened September 24, and is demonstrated by the custom of the company and the $1 a day *victualling* money *in port* for which no provision is made in the articles, and also by the

clause in the articles allowing the master "to transfer any * * * of the crew to any other * * * vessel *bound to* San Francisco * * * in the same capacity and at the same rate of wages *for final discharge any time* during the period of time called for by these shipping articles;" and the *discharge of the cargo,* even if a chief steward had anything to do with or service to perform relating *to cargo,* does not keep in force or terminate the shipping articles or the voyage as to the crew, otherwise the wages of every member of the crew would continue as under the articles, they could not leave the service of the ship and the ship could not discharge or even pay them, until the cargo was discharged, although none of the crew had any duty to perform in discharging cargo; the idea that the voyage commences when the ship *begins* to receive and *ends* only when it discharges its cargo, means *as to that cargo,* for the purpose of fixing the duties, responsibilities and rights of *the shipper and carrier* of that cargo, and not of a member of the crew who has no relation to the cargo.

In the Mermaid, 115 Fed. 13, 14, 15, by Judge *Gilbert* and concurred in by Judge *Ross,* this Court construed similar shipping articles, and treated them as articles for a *voyage,* the *voyage* being limited to a term of not exceeding *six* months; this Court said:

> "They describe the voyage in the following words: 'To ports in the district of Alaska within the Behring Sea and Arctic Ocean, and also other ports and places in any part of the

world, as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding six calendar months.' The statute (section 4511, Rev. St.) requires that the shipping articles shall state 'the nature, and so far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.' The articles in question undoubtedly comply with the second and third of these three statutory requisites. They state the duration of the intended voyage, and the country at which it was to terminate. These are obviously the most important features of the contract, so far as it concerned the seaman. They informed him of the length of time of his engagement, and, in a general way, of the place of his discharge. In describing the nature of the voyage, the terms used in the articles are, it may be conceded, somewhat indefinite, but not so indefinite, we think, as to render the articles void. They state in general terms that the voyage is from Port Blakely, the port whence the vessel cleared, 'to ports in the district of Alaska within the Behring Sea and Arctic Ocean', and 'back to a final port of discharge in the United States'. It is true that there is inserted in the description, in addition to the specified ports of destination, 'also other ports and places in any part of the world, as the master may direct', but it was evident to a seaman shipping on a brig from Port Blakely to ports in the district of Alaska in Behring Sea and 'back to a port in the United States' that there could not be, within the limit of the specified six months, any very extensive deviation from that voyage. We think the articles gave the seaman the essential information he was entitled to have. It advised him that the vessel was to go to ports in the district of Alaska in the Behring Sea, which

could only mean Nome or St. Michaels or some other port within reasonable distance therefrom, and thence to make a return voyage back to some port in the country whence she sailed. We do not think it was the intention of congress in enacting the statute to require owners of sailing vessels engaged in the coastwise trade to specify at the inception of each voyage all the ports at which the vessel might touch, or to deprive the master of the power to exercise a reasonable discretion in touching at other convenient ports, and availing himself of the oportunities afforded by the exigencies of trade. If such had been the intention of the statute, it would undoubtedly have been expressed in terms. All that is exacted is that the nature of the intended voyage be described."

And in The Grace Dollar (C. C. A.), 160 Fed. 906, 907, Judge *Gilbert,* Judge *Ross* and Judge *Morrow* concurring, said:

"The shipping articles described *the voyage* as follows: 'From the port of San Francisco, Cal., to Portland, Ore., and other Columbia River ports, and return to San Francisco for final discharge, either direct or via one or more ports on the Pacific Coast, north or south of the port of discharge, as the master may direct; voyage not to exceed six calendar months.' "

The Court (p. 907) said:

"The statute requires that the shipping articles set forth 'the nature and so far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate'. This is one of the many provisions that have been enacted for the protection of seamen, who are regarded as the wares of the nation. Its object is to prevent

the entrapping of seamen into a voyage of greater length or of more peril or labor than that which they have assented to and for which they ought to receive increased wages. Such a statute should receive a reasonable construction. Obviously, it is important that the mariner shall be informed in a general way of the general course of the voyage, but the essential requisites of the statute are that he shall know the duration of the voyage and the port of his final discharge. The Mermaid, 115 Fed. 13, 52 C. C. A. 607. It is not always feasible to name, at the outset of a voyage, all the ports to which the demands of trade may carry the vessel, and it is not necessary that the seamen be advised of all the operations of the voyage, and especially is this true of a coastwise voyage. To hold otherwise would be to impose burdensome and destructive restrictions on commerce without conferring any substantial benefit on seamen. British legislation on this subject has been influenced by the same protective policy as our own. The English merchant shipping act of 1854 (section 149) provided that the shipping articles should, among other things, set forth 'the nature and, so far as practicable, the duration of the intended voyage or engagement'. But in 1873 the section was so amended that the agreement, instead of stating the nature and duration of the intended voyage or engagement, may 'state the maximum period of the voyage or engagement, and the places or ports of the world (if any) to which the voyage or engagement is not to extend.' "

The Grace Dollar (D. C.), 149 Fed. 793.

In the Falls of Keltie, 114 Fed. 357, 359, the question was raised and decided that similar language in the shipping articles there, as that in

the articles here, "must be construed as a contract *for a voyage,* and not for a *term* of three years"; and the Court says:

> "It is my opinion that the contract must be construed as a contract for a voyage, and not for a term of three years. The agreement certainly binds the libelants to continue in the service of the ship, if required, after her arrival at Shanghai, and while trading to and fro within the limits mentioned, for a period not to exceed three years. This period is in addition to the time required for making the run from New York to Shanghai and return to a port in the United States, United Kingdom, or continent of Europe; but the phraseology of the contract excludes the idea that the libelants became bound for a term of three years, unless required to serve while the vessel should be engaged in trading to and fro between Shanghai and ports other than any port of the United States, United Kingdom, or continent of Europe. The contract is explicit that the voyage is to end at a port in the United States, United Kingdom or continent of Europe; and, as there are many ports in the countries named, and no one in particular is designated as the port at which the voyage should end, the master or owner could choose any port in either of those contries, but could only choose one port; and upon arrival of the ship at a port in the United States the voyage specified was terminated, and the contract was fully performed on the part of the libelants, so that they became entitled to claim their discharge and payment of their wages."

Also in re Chung Fat, 96 Fed. 202, 204.

The shipping articles in this case were for *a voyage only* commencing July 24, 1913 (Tr. p. 54), and

the voyage *terminated* on September 24, 1913 (Tr. p. 56, "date of termination of *voyage* 9-24-13", meaning September 24, 1913), when appellee was paid in full before and by the United States Shipping Commissioner as required by law, and discharged and released from the articles.

Section 4508, R. S., declares that one of the duties of the Shipping Commissioner is:

> "2d. To superintend their engagement and *discharge* in manner prescribed by law."

Section 4511, R. S., requires the articles to show:

> "1st. The *nature,* and *as far as practicable,* the *duration* of the intended *voyage* or engagement, specifying their respective employments."

Sections 4514, 4515, 4523, R. S., impose penalties for failure to comply with the sections as to shipping articles.

Section 4525, R. S., declares that wages are not dependent on freight.

Section 4530, R. S., declares:

> " * * * And *when the voyage is ended* every such seaman shall be entitled to the *remainder* of the wages which shall *then* be due him, as provided in Section 4529."

Section 4545, R. S., compels *payment and discharge* of seamen before Shipping Commissioner, under severe penalties.

Section 4552, R. S., states what must be done on discharge of seamen:

> "1st. Upon the *completion* before a Shipping Commissioner of any *discharge and settlement,* the master * * * *and each seaman* shall sign a *mutual release* of all claims for wages in respect of the past voyage or engagement. * * *"
>
> "2d. Such *release* so signed and attested, shall operate as a mutual *discharge* and settlement of *all* demands for wages between the parties thereto, on account of wages, in respect of *the past voyage* and engagement."

Section 19, of the Act of June 26, 1884 (23 Stat. L. 58; 6 Fed. Stat. Ann. p. 856), for *shipment* of seamen for *stated periods,* provides as follows:

> "Sec. 19. A master of a vessel in the foreign trade may engage a seaman at any port in the United States, in the manner provided by law, to serve on a voyage to any port, or for the round trip from and to the port of departure, or for a definite time, whatever the destination. The master of a vessel making regular and stated trips between the United States and a foreign country may engage a seaman for one or more round trips, and for a definite time, or on the return of said vessel to the United States may reship such seaman for another voyage in the same vessel, in the manner provided by law, without the payment of additional fees to any officer for such reshipment or re-engagement."

The shipping articles and voyage were ended, appellee paid off in full and discharged from the articles on September 24, 1913, and remained on board according to the custom of the *appellant* (not custom *of the port,* as no such custom was proved).

That this is true, is *demonstrated* by:

1. The *libel* says (Tr. p. 5): "That in the month of *September*, * * * at the port of San Francisco * * * said respondent * * * *did hire libellant to serve as* chief steward * * * for *part of a voyage* from" Balboa and to Balboa, at the wages of $100 per month, and an allowance of $1 per day for *victualling* money; and that in pursuance of *said* agreement the libelant *entered the service* of the respondent as such chief steward on board the said steamship on the forenoon of September 25.

Here is the emphatic declaration under oath in the libel, that appellee was hired and entered *the service* of appellant, *for part* of a voyage, *on September 25,* 1913, while the shipping articles were dated *July* 24, 1913, and appellee was *paid off* September *24,* 1913.

How then, is it possible to say (a) that a voyage and engagement of the articles had not expired as to appellee; or (b) that appellee was "a seaman *shipped* under an agreement", the articles which had expired? He was not *shipped* at all during this time.

2. Appellant pleaded the shortage of silverware as a *set-off* (Tr. pp. 13-15); and the learned proctor for appellee *excepted* to our answer, and in each of three several exceptions stated his objection to be that the matter of shortage pleaded as a set-off did *not arise* out of the *same contract* set forth in

the libel, viz.: *"a contract entered into on the twenty-fifth* day of September, 1913, and terminated on the first day of October, 1913" (Tr. pp. 17-18).

The appellee himself says in the libel, that he is not claiming anything under or by reason of the articles; and why should this Court say he is?

3. On the *trial,* the appellee himself swears he signed in July, 1913, and returned from *that voyage* September 23, 1913, and was *paid off* by the Shipping Commissioner *"my wages due me for that voyage"* (Tr. p. 21).

The learned proctor for appellee stated on the trial: The appellee " * * * was on the vessel *after he had been released from the shipping articles"* (Tr. p. 35). Again emphasizing the fact that the shipping articles and the voyage under them, so far as affects the appellee, were gone, they were a "story told"; and we cannot believe this Court is going to allow appellee to be helped out by shipping articles that he and everyone else, including the trial Court, treated as ended and terminated.

4. The learned District Judge, in his opinion and findings (Tr. pp. 58-61), said:

> *"Libelant shipped as chief steward, on respondent's steamship 'City of Sidney', in July for round trip voyage from San Francisco to Balboa. The voyage ended in September, and on September 24th libelant received from the Shipping Commissioner all of his wages therefor.*

"*The 'City of Sidney' makes regular trips between these ports*, and while in San Francisco, during the time this controversy arose, was engaged in discharging freight brought in, and loading freight for the next trip. It is the custom for the employees to remain on duty while in port unless they receive notice of discharge from such employment, and *to sign articles for the next trip on the day preceding the next sailing day*. While in port they receive what is known as port pay, that is to say, their *regular wages plus one dollar per day for victualing*, as no meals are served on the vessel during her stay. Following this custom libelant, having received no notice of discharge, remained in the service of respondent while the 'City of Sidney' was discharging and receiving freight *for its* next trip, *from September 25th to October 1st, inclusive*. Upon October 1st he was told that his services would not longer be required. Upon demanding his wages for this service in port he was informed that while his wages amounted to $30.33, he could not receive them, because of the loss of certain silverware entrusted to him as chief steward when he shipped in July and not accounted for by him at the end of the trip on September 24th, or thereafter, and amounting in value to $32.90, which sum respondent claimed the right to offset against his wages of $30.33, earned while in port. This setoff is pleaded as a defense and *libelant interposed exceptions thereto on the ground that it did not arise out of the same contract* as that upon which the suit was brought; that if entitled to offset this loss at all, respondent should have done so *at the time the libelant received his wages on September 24th at the end of the voyage for which he shipped, and that the employment of libelant while in port was*

under a new contract beginning at the time he signed off at the end of the voyage.

"The rule is well settled that in the admiralty Court a setoff to be allowed must grow out of the same transaction as that which must be proved to support the libel. But it seems to me that as there was but one contract of hiring here, that is to say, *the contract entered into in July when libelant shipped* as chief steward, and as he would have to prove this contract in order to claim that *he continued in the employ* of respondent *after receiving his wages and signing off on September 24th,* by reason of the custom before mentioned, the matters set up are sufficiently connected with the contract upon which he relies to constitute, if sustained, a proper setoff, and for that reason the exceptions to the special defense are overruled."

Thus, it appears demonstrated by this learned judge that appellee's *libel* was untrue; he was *not* hired September 25, 1913, for *any part* of a voyage; he had been employed under an *express written* agreement in the shipping articles, and he *had* been paid off and released therefrom and appellant likewise released from the articles; and appellee simply *remained* on board *without any hiring or agreement* except the *custom* of the appellant that while they remained on board while the ship was in port, appellee would receive the same wages *he did* at sea and $1 per day victualling money; so that, as the learned district judge says:

"he would have to prove this contract in order to claim that *he continued in the employ* of respondent *after* receiving his wages and

signing off on September 24th by reason of the custom before mentioned" (Tr. pp. 59, 60).

5. The learned counsel for appellee, on page 31 of his brief filed *in this Court*, said:

> "* * * I believe that it is a reasonable conclusion that *there was a new contract of hiring* in pursuance of the custom *for the remainder of the voyage after* appellee had received his wages for the first part of the voyage from the Shipping Commissioner."
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> Brief of Appellee, p. 31.

It is folly to dispute over whether the voyage *ends* with the discharge or commences with the loading of the cargo, because *the agreement* in this case is in the record, the shipping articles, in which must be contained their agreements, and these articles engage the seaman to serve from San Francisco to Ancon and *back to final discharge* in San Francisco.

The shipping articles in this record are for *a voyage* limited to six months to return *to* San Francisco *for final* discharge; when the vessel arrives at *Ancon,* the destination named, she must return the seamen to San Francisco for final discharge, either on the same vessel or upon another, in the same capacity, and at the same wages; and when the vessel gets "back to a final port of discharge *in* San Francisco" (Tr. p. 54), under the express contract in the articles, the seamen are entitled to final discharge.

The articles expressly authorize the transfer of the seamen within the six months to any vessel *bound to* San Francisco *for final discharge* (Tr. p. 55).

See also: Section 4596, R. S., Sub-div. "3d".

Section 4525, R. S., expressly provides that:

> "No right to wages shall be dependent on earning of freight by the vessel; but every seaman * * * shall be entitled etc."

The voyage does not *terminate* until an *arrival at* the port of discharge.

U. S. v. Smith, 27 Fed. Cas. No. 16,337.

In 35 Cyc. p. 1194, it is said:

> "A seaman's contract generally terminates on the completion of the voyage, and it has been held that he may properly demand payment at that time."

And in note "68", to this statement of the law, 35 Cyc. p. 1194, says:

> "*Formerly,* the service of the seaman was considered not to terminate *until* the *discharge* of the cargo, and consequently he was held not to be entitled to payment of his wages until then." Citing a number of the *old* decisions.

Again, 35 Cyc. p. 1193:

> "but they are not obligated to assist in unloading the cargo at the port of final discharge."

Now, Section 4596, R. S., provides:

> "Whenever any seaman who has been lawfully engaged * * * commits any of the

following offenses, he shall be punished as follows: * * *

"'3d. For quitting the vessel, in whatever trade engaged, at a foreign or domestic port, without leave *after her arrival* at her port of delivery *and before she is placed in security,* by forfeiture from his wages of not more than one month's pay.'"

In the case of Ralli v. New York T. S. S. Co., 154 Fed. 286, 287, 288, the Circuit Court of Appeals for the second circuit, by Lacombe, circuit judge, Wallace and Townsend, circuit judges concurring, and the celebrated admiralty firm of Butler, Notman & Mynderse, and Frederick M. Brown, for appellant, and Lawrence Kneeland an equally able proctor for the respondent, a claim was made under Section 3, of the "Harter Act", the cargo had been shipped from Galveston on respondent's steamer "Alamo", for transportation to New York, there to be delivered, and had been discharged on *its* lighter for transfer to Hoboken when the lighter sank while moored at her pier; the Court of Appeals said:

"We are of the opinion that respondent cannot claim the benefit of the section above quoted for the reason that *the voyage had not commenced,* the cargo was not yet all on board, nor the vessel ready to sail."

In Deslions v. La Bourgogne, 210 U. S. 95, 135, the Supreme Court, by Chief Justice *White,* said:

"Undoubtedly the word 'voyage' may have different meanings under different circumstances, depending on the subject to which it

relates or the context of the particular contract in which the word is employed."

In Martin v. The Southwark, 191 U. S. 1, 11, the Supreme Court said:

"A ship may be seaworthy as to one sort of cargo and unseaworthy as to another."

So, in this case, the "voyage" of the "City of Sydney" terminated *as to her crew,* when she arrived at San Francisco, her port of final discharge, and was safely moored; as to her cargo and her relations to its owners, shippers and consignees, and the insurers, these are questions which give a different meaning to the word "voyage", but such meaning in no possible aspect affects the crew of the vessel, or determines when or where or how their service either continues or terminates.

See The Fortuna, 206 Fed. 573, where Judge Cushman quotes The Seguranca, 58 Fed. 908, thus:

"* * * Since the voyage is not ended *as regards the goods,* until they are delivered, or ready for delivery."

In Carver's Carriage by Sea (4th Ed.), Section 21, it is stated:

"In the Rona, 51 L. T. 378, it was held that the *voyage* must be considered to commence, for this purpose (seaworthiness), when the ship starts from whatever were her moorings."

Wilson v. Manhattan Canning Co., 210 Fed. 898.

Third. The Court, as to the commencement and ending of a voyage and that a voyage does not end until the cargo has been discharged and commences at the time it begins to receive cargo, was *misled* by the brief of the learned counsel for appellee (pages 17 and 18), wherein the Court relied upon the accuracy of his statements assumed to be quotations from 1 Cyc. 833, and the Court, apparently without making an examination, and changing slightly some of the counsel's language, in the opinion says:

> "It seems to be now settled that the services of stevedores in loading and unloading a vessel are maritime in character, which is, of course, based upon the theory that the *voyage* of the vessel does *not end* in the one case *until the cargo* has been *discharged,* and, in the other, that the voyage *commences* at the time the vessel begins to *receive* cargo. 1 Cyc. of Law & Procedure, p. 833, and note to the case of Baltimore Steam Jacket Co. v. Patterson, 66 L. R. A. 293, and numerous cases there cited."

There *is no such language in* 1 Cyc. 833, nor in the *or any of the cases cited.* As to the ending or commencement of the voyage counsel in his brief (pp. 17 and 18) said: "It is now a well established principle that" and then quotes from 1 Cyc. 833, thus: "the services of stevedores in loading or unloading a vessel are maritime in character, and claims therefore are within the admiralty jurisdiction" (1 Cyc. 833, citing several cases); then counsel continues: "The services of stevedores *can only* be considered maritime on the assumption

that the *voyage* of a vessel, so far as the jurisdiction of a Court of admiralty is concerned, does *not end* until the *cargo* has been *discharged,* and that the *voyage* of a vessel commences at the time it begins to receive cargo." And on the next page: "In volume 66 of the Lawyers Reports Annotated, after the case of Baltimore Steam Packet Co. v. Patterson, p. 293, there is a very exhaustive note on the 'Admiralty Jurisdiction of Contracts'. So that, as to when the *voyage ends* and commences, *this Court has been misled by the brief of the appellee* into accepting without examination and quoting in the opinion, with slight change of language, that which is not in the law books named, and is, we submit, *not the law.*

The Court quotes many cases where every person *aboard* a ship is held to have a right to proceed against the ship *in rem*; and such are the English cases quoted in the opinion.

This *libel* is *not* against the *ship,* but *in personam* against the *owner.*

Neither 1 Cyc. 833, nor the exhaustive note to 66 L. R. A. 193, justifies the statements of the Court in the opinion, or the statements of the learned counsel in his brief as to the *ending* and commencing of the voyage by the discharging and loading of the cargo; and that case was for breach of a contract to furnish a marine carrier freight for transportation.

The Court in its opinion say:

> "The only remaining question is whether the provision of Section 4529, of the Revised Statutes, imposing the designated penalty for failure to pay the wages within the required time, is applicable to this case.
>
> "It is first contended on behalf of the appellant that the section referred to expressly relates to 'seamen shipped under an agreement.' *That is true,* but the answer is, as has been *above pointed out,* that the libelant was a seaman and rendered the service for which he libeled the ship *under* shipping articles duly executed and *in force* at the time of the rendition of the service."

Judge Hughes in his work on *Admiralty,* states the reasons for holding the stevedore's services to be maritime have to do with the stowing, loading and unloading of the cargo, in a similar manner to Benedict, but says nothing about the ending or commencement of the *voyage* having anything whatever to do with their maritime character.

Hughes on Admiralty, pp. 112-115.

Benedict (4th Ed.) p. 162, Sec. 207, thus states the reasons sustaining the maritime character of stevedore's services:

> "Sec. 207. STOWAGE. STEVEDORES. 'To enable the vessel safely to transport her cargo, it is of the first importance that it be well stowed, that the vessel may keep her trim, that one portion of cargo may not injure another by contact, by leaking, by steam, heat, odor, and that storms may not dislodge and destroy it. The business of stowing ships and of breaking

> out cargo at the port of delivery, has fallen into the hands of a separate class of artisans, known as stevedores. Their services are maritime, and they may enforce the payment of their demands by suits in rem against the vessel, or in personam against the master or owners. It was for a long time held that there was no lien for stevedores' services. Judge Lowell in the George T. Kemp seems to have been the first to hold that a lien for such services was created, at least upon foreign vessels, and, though there is still an occasional dissent, it may be regarded as practically settled that a lien accompanies the services of a stevedore."

We feel certain that the Court was *misled* by these matters in the early part of the learned counsel's brief as to the *ending* of the voyage in this case; so that, while the Court *agreed* with our contention and expressly stated that our contention *was true*, that Section 4529, Revised Statutes *only* applies to "a seaman shipped under an agreement", the Court believed the round voyage from which appellee had returned, been paid in full and signed off the articles, was *not ended* because the cargo had *not* been discharged, and for that reason only, the opinion of this Court was constituted as it appears above. Had this Court *examined* its quotation from 1 Cyc. 833 and the *exhaustive* note in 66 L. R. A. 193, we feel sure that the opinion would not read as it does, or the discharging of cargo be held to be the *end* of the voyage or of a chief steward's term of service.

In 35 Cyc., pp. 1193, 1194, the duty of the crew is thus stated:

> "Loading and unloading cargo *in a foreign* port are implied conditions of their employment; but *they are not* obligated to assist *in unloading the cargo at the port of final discharge, unless* the shipping *articles* contain a stipulation *to that effect*, or the established custom of the port requires it." Citing many cases.

There are *no provisions in* the shipping *articles* here requiring the crew to load *or* unload cargo at this port of final discharge.

Fourth. In every case that has, prior to this, come before the federal Courts of this country, the terms "without sufficient cause" in Section 4529, Revised Statutes, have uniformly been held to mean and be the equivalent of "without reasonable cause", even though the Courts were compelled to hold such cause to be *insufficient in law,* and where payment was not arbitrarily refused and there was a fair question for controversy, this penalty has *never before been imposed;* and in this case, where appellant assisted appellee in so speeding the cause, that commenced on October 20, 1913, for wages claimed to be payable on October 1, the answer was filed October 25, five days later, the trial and decision October 29, nine days later, the decree November 5, the notice of appeal to this Court November 14, *all* in less than one month, we respectfully and earnestly submit, should entitle appellant to some measure of relief from the *extreme severity* of the decision and judgment of this Court, and in a Court of and a cause *in admiralty.*

In The George W. Wells, 118 Federal, 761, 762, 763, the Court said:

> "It remains next to consider *if the libellants are entitled to the additional payment* provided for in Rev. St. Sec. 4529, as amended by Section 4, c. 28, Acts 1898; 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077). *Was the payment* of the wages *delayed 'without sufficient cause'?* That *the cause* of delay *was insufficient in law,* has just been determined, *but to contrue the language thus narrowly is contrary to its reasonable intent.* Congress can hardly have intended that in every controversy, however doubtful, which finally results in the seaman's favor, he shall be entitled to additional compensation so large. Let us suppose, for example, a disputed question of fact concerning wages, where the conduct of the sailor has been such that the court refuses him costs, though he finally prevails so far as to collect a small part of his original claim. Payment is delayed until the decree of the court, made a year or more after the claim accrued. Can it be that the Court is absolutely compelled, either in the original suit or in one subsequent, to award the libellant a bonus of four or five hundred dollars in addition to the four or five dollars of his wages actually detained? I think not. See The Alice B. Phillips (D. C.), 106 Fed. 956; The Topsy (D. C.), 44 Fed. 631, construing Statutes 17 and 18 Vict. c. 104, Sec. 187. It is easy to perceive that the construction of the statute urged by the libellant would encourage seamen to speculate upon controversies between themselves and the ship. The phrase *'without sufficient* cause' *should* rather *be construed as equivalent to* 'without *reasonable cause'.* In this sense there was reasonable cause in the case at bar for the delay in the payment."

In The Empress, 129 Federal, 655, 656, the Court said:

> "The statute is a *penal* statute, intended to punish masters of vessels who, *without any just excuse, arbitrarily refuse to pay* seamen their wages when due."

In The St. Paul, 133 Federal, 1002, the Court said:

> "The claimant, in my opinion, was justified in contesting its liability, and there should be no fines imposed under the statute imposing them for *unreasonable* delay in the payment of wages."

In The Sadie C. Sumner, 142 Federal, 611, 613, the Court said:

> "Revised Statute, Section 4529, does not apply, as claimed in the libel, to such a case as this. There was *a fair question for controversy,* and therefore no refusal to pay without sufficient cause, within the meaning of that section. The George W. Wells, 118 Fed. 761; The Empress, 129 Fed. 655."

In The Sentinel, 152 Federal, 564, 566, the Court said:

> "Under the Peterson libel, the claimant shows reasonable grounds for disputing the claim, even if not able to make out a defense sufficient to prevent any recovery on the part of the libellant; and therefore the additional penal damages provided for in Section 4529 will not be allowed."

Also The Amazon, 144 Federal 153, 154.

Fifth. The conclusion of the opinion and judgment that our appeal to this Court constituted

such delay in the payment of the wages of appellee as entitled him to the penalty provided for in Section 4529, Revised Statutes, as a *continuing* penalty until the *wages,* as a part of the original decree are paid, is incorrect, is not within the province of a Court of Admiralty, and is without the jurisdiction of the district and this Court in cases in admiralty; the *decree* does not adjudge appellant liable for or that appellee recover any penalty nor state the amount of the wages, but as it stands is a decree for the *full* amount to its date of wages and penalty, and appellant could not segregate therefrom and pay into the registry of the Court an amount for the wages of appellee and continue its appeal as against the penalty; the penalty is merged in the decree, penalty ceases with the decree and only interest can be recovered on the amount of the decree, under Section 966, Revised Statutes, as well as under the general rule of judgments.

In his *dissenting* opinion, Judge *Dietrich* clearly demonstrates the erroneous conclusion of the Court on this question as follows:

> "I fail to see any substantial reason for concluding that the plaintiff's cause of action was not merged in and swallowed up by the decree, as is the general rule. United States v. Price, 50 U. S. 83, 93.
>
> "As to the severity of the penalty, there is of course no thought of suggesting that a Court can properly decline to enforce a statute because it may seem to be unnecessarily harsh. But the question being, what is the meaning of the statute, what penalty Congress really in-

tended to impose, it is deemed proper to consider the effect of the law in practical operation; for if, under one of two possible constructions it will operate with extreme and unnecessary severity, and under the other it will operate reasonably and yet accomplish the purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the Court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the Court The case is itself fairly illustrative. It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The right of appeal is thus virtually denied, for no sensible litigant of ordinar resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim, but that does not necessarily imply bad faith or a willingness to oppress; it is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this Court; it also presents here, as is its right, the question of the correctness of the lower Court's holding that the case falls within the provisions of Section 4529 of the Revised Statutes, imposing the penalty complained of, and this I conceive to be a fair question the answer to which is not free from serious doubt.

"It is to be borne in mind that the law is rendered harsh, not by interpreting it in the light of a general principle, that is, the principle of merger, with which it may be assumed Congress was familiar, but by holding that it is exempt from the operation thereof, and is an

exception to the rule. No reason is assigned for such a course except that which may be found in a rigidly literal reading of the provision. But why should we insist that the strict letter of the provision prevail over the presumption that Congress intended that in the administration of the law regard should be had for the general principles under which other laws of like character are administered. A decision directly in point is that of Mass. v. Western Union Telegraph Co., 141 U. S. 40, 46. A statute of Massachusetts imposed a penalty for the non-payment of taxes 'at the rate of twelve per cent per annum until the same (the taxes) are paid'. There, as here, by the strict terms of the law there was to be a continuous accumulation of the penalty until the principal obligation was discharged. But the Court said: 'The penal rate of twelve per cent interest ran only until the amount to be recovered was judicially ascertained. Since the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of six per cent only.' Upon principle I cannot see how that case can be distinguished from this, and it should I think be held to be conclusive.

"Appreciating the strain, the appellee suggests that this being an admiralty case the trial here is *de novo*, and that final decree is in this Court; but this is an erroneous assumption. Benedict's Admiralty (4th Ed.), Sec. 566. As appears from the opinion, there has been no new trial, nor will any decree be entered here."

That an appeal in admiralty is not a new trial at the present day, is clearly shown by Benedict on Admiralty (4th Ed.), Section 566, as follows:

"Until the establishment of the Circuit Courts of Appeal in 1891, review of the decree

of the District Court was had in the Circuit Court, and such appeal was a new trial. New pleadings could be put in, new proofs taken, the libellant opened and closed the argument, as in the court below, and the Circuit Court executed its own decrees.

"The Circuit Court of Appeals Act created a court which was entirely a court of review, and which did not execute its own decrees. *Assignments of error* were required, and the statute, and the general rules propounded for the Circuit Courts of Appeal by the Supreme Court, made no provision for new pleadings or new evidence. And so, in some of the circuits, an appeal in admiralty has not been regarded as a trial *de novo,* but as a review of the decree of the court below on points of law only. The Ninth Circuit has held that findings of fact, made by the District Court on conflicting evidence, will not be disturbed on appeal, unless clearly contrary to the evidence, which holding is inconsistent with the idea that an appeal is a new trial. The Fourth Circuit has held the same, though sometimes in a modified form, i. e., that the conclusion of the District Court on points of fact is entitled to great respect, but is not necessarily binding. Other circuits have held as above, or have not passed on the point. It has also been held that when a District Judge saw and heard the witnesses, he is better qualified than the appellate court to judge of their truth or falsity, and his findings in such cases will not be disturbed, while the same rule does not obtain when the testimony below was taken out of court. And the Circuit Courts of Appeal have also held that the conclusions of a master or commissioner on matters of fact, made on conflicting evidence, will not be disturbed unless in cases of palpable mistake. A point not considered below will not be considered on appeal, though a plain error may be noticed.

> And in many cases it has been held that one who has not appealed from the decree below can be heard in the appellate court only in support of that decree, and can get, in the higher court, no more relief than has been allowed him by the decree of the lower court.
>
> "All of these holdings follow the idea that a present-day appeal is not a new trial, and hence is not an admiralty appeal in the older sense of that term, but rather resembles a writ of error at common law."

Sixth. The Court *overlooked* our point "Third", of Division III, pages 36 to 38, of our brief, that Section 4529, Revised Statutes, does not apply to this vessel in the *coastwise trade,* because that section was taken from the "Shipping Commission" Act of June 7, 1872, and was, so far as coastwise trade like the vessel here was engaged in, was *repealed* by the Act of June 9, 1874 (C. 260, 18 Stat. L. 64, 6 Fed. Stat. Ann. 850, U. S. Comp. St. 1901, p. 3064), which later Act provides:

> "That *none of the provisions* of an act entitled 'An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States and for the further protection of seamen' *shall apply to* sail or *steam vessels* engaged *in the coastwise trade, except* the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

In Wilson v. Manhattan Canning Co., 205 Federal 996, 997, the Court said that if Section 4527, Revised Statutes, includes cases other than those of wrongful discharge, *it is inapplicable to a coastwise voyage* of the nature of the one set up in the libel.

Also:

The George B. Ferguson, 140 Federal 955, 956;

The Elihu Thompson, 139 Federal 89;

U. S. v. Smith, 95 U. S. 536.

Section 2447, Revised Statutes, provides for *shipping crews in the coastwise trade*, and *expressly* declares that:

> "*such seamen shall be discharged and receive their wages* as provided by *the first clause* of Section 4529 (and the *penalty* for *not* paying is not found in the *first* clause but in the *second* clause of Section 4529), and 4526, 4527, 4528, 4530, 4536, 4542, 4545, 4546, 4547, 4549, 4550, 4551, 4552, 4553, 4554, and 4602, of the Revised Statutes; *but in all other respects* such shipment of seamen and such shipping *agreement* shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

The "City of Sydney" was engaged in the coastwise trade, as provided for by Section 2447, Revised Statutes, and *the first clause only* of Section 4529 is applicable thereto; and the appellee *never shipped or signed any agreement* either in the coastwise trade or at all, *after he returned* from the round

voyage to Balboa on September 23, 1913, and *was paid* for that round voyage *in full* on September 24, before the United States Shipping Commissioner, *and signed off the articles.*

We respectfully submit a rehearing should be granted appellant.

Dated, San Francisco,
June 17, 1914.

KNIGHT & HEGGERTY,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,
Proctor for Appellant and Petitioner.

APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Pacific Mail Steamship Company (a corporation), Appellant, vs. Ed. Schmidt, Appellee.	No. 2352

[OPINION, U. S. CIRCUIT COURT OF APPEALS.]

Upon Appeal from the United States District Court for the Northern District of California, Division No. 1.

Before GILBERT and ROSS, Circuit Judges, and DIETRICH, District Judge.

Ross, Circuit Judge.

The appellee shipped as steward, at the wages of one hundred dollars a month, on board the steamship City of Sydney, the home port of which was New York, under shipping articles of date July 24, 1913, signed on behalf of the respective parties, then "bound from the port of (1) San Francisco to Ancon, Canal Zone, and such other ports and places in any part of the world as the master may direct, and back to the final port of discharge in

San Francisco, the United States, for a term of time not exceeding 6 calendar months." Among the terms specified in the articles were the following:

"And it is hereby agreed that any embezzlement or wilful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. * * * And it is also agreed that the master has the option to transfer any and all of the within mentioned persons, members of the crew, to any other American, British or other foreign vessel bound to San Francisco, California, in the same capacity or as a passenger and at the same rate of wages for final discharge any time during the period of time called for by these shipping articles."

The case shows that the ship left San Francisco on the 24th of July, 1913, for Balboa, returning to San Francisco on the 23rd day of the following September, and that on the next day, September 24th, the appellee received from the Shipping Commissioner all of his wages for that round trip—the ship then being tied up at the wharf discharging her cargo. What the appellee did during that time and what is referred to by the trial judge and by counsel as the custom then prevailing at the port of San Francisco, is thus stated by the appellee in his testimony, of which we find no contradiction in the other evidence:

"Q. What was the procedure after you returned from the voyage regarding receiving your money?

"A. I got paid off by the Shipping Commissioner, my wages due to me for that voyage.

"Q. Why did you remain on board the ship?

"A. I was still chief steward on the boat and not notified I had been discharged for anything and I worked on board as chief steward.

"Q. What are the duties of the chief steward on the steamer? A. During the voyage?

"Q. Yes, during the voyage.

"A. He is simply the head of the commissary department, keeps the rooms clean and look after the passengers and so on.

"Q. What else?

"A. To look after his help and see that the work is done.

"Q. What does the chief steward do?

"The COURT. Q. You have charge of the rooms of the passengers, have you? A. Yes, sir.

"Mr. RYAN. Q. What does the chief steward do after he arrives in port?

"A. After he arrives here we clean the ship.

"Q. You mean you superintend it?

"A. Yes, and see that the stores are put on board for the next voyage, get the ship ready for sea for the next voyage.

"Q. Is your work while in port very similar to that while on the voyage? A. Yes.

"Q. What is the difference between your duties while on the voyage and while the ship is in port?

"A. The difference is we have no passengers on board, while we are in port we do not cook any meals, we just clean up and see that repairs are done and the stores put on board for the next voyage.

"Q. When are the supplies ordered and who orders them?

"A. I put in a requisition for supplies and deliver the requisition book to the port steward.

"Q. Who places those provisions on board?

"A. The chief steward—he sees that it is put on board.

"Q. How many men are employed under you while the vessel is on the voyage?

"A. The steward's department, or what they call the commissary department in that company, has 22.

"Q. That includes the title of what positions?

"A. The steward, the steerage cooks and bakers, butchers, cooks, waiters.

"Q. How long after the ship arrived at the dock do the seamen go before the Shipping Commissioner and receive their wages?

"A. Generally it is the day after.

"Q. And how long before the vessel leaves the dock do the seamen go before the Shipping Commissioner and sign new articles?

"A. One day before leaving on that voyage."

The evidence is that the appellee was allowed one dollar a day for his meals while in port as no cooking was done on board during the time, and

that such was the custom at the port of San Francisco.

The day before the ship was to sail on its next voyage the appellee was discharged, at which time there was due him for his wages and meals while in port $30.33, the amount of which was not questioned, but when he demanded it on the 1st day of October, 1913, the appellant steamship company refused to pay it on the contention that certain silverware, which the company claimed was entrusted to him as chief steward when he shipped in July, was not accounted for by him at the end of the trip, or thereafter, amounting in value to $32.90, which sum the company claimed the right to offset against his wages of $30.33 earned while in port; and this setoff it pleaded as a defense to the appellee's libel for his wages, which libel also contained a demand against the steamship company for one day's pay for every day his wages were unpaid after October 1st, 1913, as a penalty under and by virtue of Section 4529 of the Revised Statute as amended by the Act of December 21, 1898 (30 St. L. p. 756), for which penalty, together with the wages due, the Court awarded the libelant a decree. The section of the Revised Statutes, as so amended, is as follows:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first hap-

pens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court; but this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

It is contended on the part of the appellant company that the case is not within the admiralty and maritime jurisdiction of the Court, for the reason that the service of the appellee while the ship was at the port of San Francisco was not a maritime service. There is nothing in the decision of the case of California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, to justify the contention, nor is there in the case of The Sirius, 65 Fed. 226. In the latter case the keeper of a vessel in her home port and then out of com-

mission, filed a libel against her for his services, and the Court said, among other things:

"The libelant, we have seen, rendered the service of a ship keeper in the home port of the vessel. He was hired particularly to take care of the engine and boilers, and also to look after the vessel in general. In this he was assisted by a deck watchman. How his duties, assuming them to have been efficiently rendered, contributed to the navigation of the Sirius, it is difficult to see. The vessel was not then engaged in navigation. She could not do so, being out of commission. She was laid up, without cargo, or even master and crew. Giving the libelant's claim the most favorable consideration, it can only be said that his services tended to the preservation of the vessel, so that when she should be enrolled as an American vessel she might be fitted out for a voyage less expensively and more expeditiously. But such service did not contribute to the navigation of the vessel. Merely keeping a vessel in safe custody, protecting it from the depredations of thieves or the danger of fire, or preserving her machinery from unnecessary decay and deterioration, does not, of itself, constitute a maritime service. It must be connected with the navigation of the vessel. It is difficult to see, therefore, upon what ground it can be said that the libelant rendered a service of a maritime nature. His services did not contribute to the present navigation of the vessel, because she was then laid up; nor to her prospective navigation,

because she had no voyage in contemplation. To be sure, it concerned the vessel, but it did not concern the vessel with reference to her navigation, present or prospective. Looking at the question in the light of the authorities, we find that, although there has been, and is yet, some conflict as to whether a mere ship keeper or watchman can be deemed to have rendered a maritime service, the weight of authority is against the right of individuals performing such services to a vessel in her home port to recover in a court of admiralty, for the reason that it is not regarded as a maritime service within the signification of that term. But the cases, while establishing the general rule, have also created exceptions which, if given full latitude, may become almost as wide as the rule itself. The reason for the exceptions is that, if the ship keeper or watchman, in connection with his duty as such, render any distinctively maritime service, such as moving the vessel to a different anchorage, or preparing or fitting her out for a voyage, or in brief any service connected with the navigation or voyage of the vessel, then the Court of Admiralty will not only take cognizance of the maritime service rendered, but, if it be sufficiently broad and pronounced, will treat the entire service as maritime."

In the present case the vessel was in active service, the present libelant a regular seaman under shipping articles, whose term of service had not expired and who, while the ship was discharging her cargo preparatory to another voyage, was cleaning

ship, storing supplies therein, and otherwise performing the duties pertaining to his position of steward.

In the case of Leathers v. Blessing, 105 U. S. 626, which was an action of tort, the Supreme Court held that the jurisdiction in admiralty is not ousted by the fact that when the wrong was done on the vessel by the negligence of her master she had completed her voyage and was securely moored at the wharf, where her cargo was about to be discharged, the Court saying (page 628) among other things:

"The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the District Court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the Circuit Court did not find that the libelant was an officer, seaman, passenger or freighter, or that he had any connection with the vessel or any business upon her or about her, except that when he went on board of her he was expecting a consignment of cotton-seed by her, and went on board to ascertain whether it had arrived; and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence

was at the time in control of a vessel which had been previously engaged in navigating waters within the jurisdiction of the admiralty courts of the United States, cannot give jurisdiction to such courts. Although a suit might have been brought in a common law Court for the cause of action sued on here, the District Court, sitting in admiralty, had jurisdiction of this suit. The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf, and had communication with the shore by a gang plank, did not make her a part of the land or deprive her of the character of a water-borne vessel."

In the case of the Steamship Jefferson, 215 U. S. 130, which was a case of salvage, and where the jurisdiction of the Court was challenged on the ground that at the time the services sued for were rendered the ship "was in a drydock undergoing repairs, was not on the sea, but was virtually on the shore, and was consequently at such time not an instrumentality of navigation, subject to the dangers and hazards of the sea", the Supreme Court said, among other things:

"By necessary implication it appears from the averments of the libel that the steamship before being docked had been engaged in navigation, was dedicated to the purposes of transportation and commerce, and had been placed in the dry dock to undergo repairs to fit her to continue in such navigation and commerce. As said in Cope v. Dry Dock Co., 119 U. S. 625, 627, 'A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving a salvage service.' In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land. Clearly in the case last supposed the vessel would not cease to be a subject within the admiralty jurisdiction merely because, for a short period by the operation of nature's laws, water did not flow about her. Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the loading and unloading of vessels at abutting quays, and the dry

dock into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because in the one case the water is confined within the dock by means of gates closed when the tide begins to ebb, while in the other the water is removed and the gates are closed to prevent the inflow of the water during the work of repair. It was long ago recognized by this Court that a service rendered in making repairs to a ship or vessel, whether in or out of the water, was a maritime service. Peyroux v. Howard, 7 Pet. 324. But we need not further pursue the subject, since the error of the contention that a vessel, merely because it is in a dry dock, ceases to be within the admiralty jurisdiction, was quite recently established in The Robert W. Parsons, 191 U. S. 17. In disposing of the proposition we are now considering it was further said (p. 33):

"'A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was in fact performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. * * * A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries

suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. * * * But as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exists.' "

"It seems to be now settled that the services of stevedores in loading or unloading a vessel are maritime in character, which is, of course, based upon the theory that the voyage of the vessel does not end in the one case until the cargo has been discharged, and, in the other, that the voyage commences at the time the vessel begins to receive cargo. 1 Cyc. of Law and Procedure, p. 883, and note to the case of Baltimore Steam Packet Co. v. Patterson, 66 L. R. A. 293, and numerous cases there cited. That the appellee was a seaman of the City of Sydney in rendering the services in question, and as such within the admiralty jurisdiction, we regard as clear. Section 4612 of the Revised Statutes expressly provides, among other things, that:

"In the construction of this Title, every person having the command of any vessel belonging to

any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seáman'."

But regardless of the statute, we think that under the general maritime law the present libelant was a seaman, and as such entitled to sue in admiralty.

In Benedict's Admiralty, 4th Ed., Sec. 189, it is said:

"The Term Mariner includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage. Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck-hands, waiters—women as well as men—are mariners."

In the case of The Queen v. The Judge of the City of London Court and the Owners of the S. S. Michigan, 25 Law Reports, Q. B. D. 339, the ship having arrived at the port of London, which was her destination, her crew, including the mate, were paid off. The mate after being so paid, and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After the inward cargo had been discharged and a portion

of the outward cargo had been shipped on board, the ship was taken into dock for repairs, and the mate continued on board by the owner's direction to superintend the execution of such repairs. The question was whether the services so rendered by the mate were maritime services, and the judges thus disposed of the question:

"Lord Coleridge, C. J. We have had an opportunity of consulting the learned judge of the Admiralty Court, who has had a large experience in these matters, and although my own impression was at first the other way, I defer to his authority, and come to the conclusion that the County Court judge was wrong, and that an action in rem will lie at the suit of a person in the position of the present plaintiff. To allow of that remedy in such cases as this has, it appears, been the practice of the Admiralty Court. I find that we are not embarrassed with the consequences which I was afraid would follow if our decision proceeded upon the definition of the term 'seamen' in the Merchant Shipping Act—a definition which would undoubtedly include such a person as a stevedore. For the question here does not depend in any way upon the Merchant Shipping Act, inasmuch as the Acts of Parliament giving Admiralty jurisdiction to County Courts does not incorporate that act. The action ought to be heard. The rule must, therefore, be made absolute.

"Wills, J. I am of the same opinion. I have had the opportunity, not only of speaking to my brother Butt upon the subject, but also of looking into the question for myself, and, upon consideration of the authorities, I have independently arrived at the same conclusion. The case seems to me to be practically governed by the case of *The Jane and Matilda* (1), where Lord Stowell held that the woman who had acted as caretaker was entitled to claim against the ship—a decision which, so far as I can make out, seems to be entirely in accordance with the uniform current of authority. The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea. It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbour at the time."

In the subsequent case of Corbett v. Pearce, 2 K. B. D. (1904), the Court said (p. 427):

"What is usually understood by the term 'seaman' in its ordinary acceptation? It seems to me

that a correct definition was given in the case, to which we have referred, of *Reg. v. City of London Court*, where it was held that a person whose ordinary duties led him to take part in the navigation of a seagoing ship was entitled to a remedy against the ship for his wages, although the services rendered by him consisted in superintending repairs to the ship while in port. It was there said: 'The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea.' That description of the persons who may popularly be called seamen is very applicable to the present case."

The trial Court in the instant case was, in our opinion, right in holding that the set-off pleaded in defense of the libel was not sustained by the evidence. There was nothing tending to show any bad faith on the part of the steward, or even tending to show any negligence or lack of care on his part in the performance of his duties, nor was there, as said by the trial judge, sufficient evidence of the alleged missing articles ever having been delivered into his keeping. On the contrary, the appellant's San Francisco port steward testified that it was usual on voyages for a small amount

of the silverware of the ship to be taken by passengers "for souvenirs, and for medicine, and for one thing and another"; usually five or six dollars' worth, said the witness. In the present case the amount claimed to have been lost was, as has been said, of the value of $32.90.

We are of the opinion that no sufficient cause was shown for the refusal of the appellant to pay the libelant his wages upon his discharge from service.

The only remaining question is whether the provision of Section 4529 of the Revised Statutes, as amended December 21, 1898, imposed the designated penalty for failure to pay the wages within the required time, is applicable to the case.

It is first contended on behalf of the appellant that the section referred to expressly relates to "seamen shipped under an agreement". That is true; but the answer is, as has been above pointed out, that the libelant was a seaman and rendered the service for which he libeled the ship under shipping articles duly executed and in force at the time of the rendition of the service.

The further contention is made that it has been uniformly held that the penalty will not be imposed in any case where there is a fair ground of dispute. Conceding the justice of the rule, we are of opinion that the evidence in the present case does not show any such fair ground of dispute.

It has been suggested that the libelant's entire cause of action was merged in the judgment entered in the trial Court, that the delay in paying that judgment is compensated for by interest thereon, and also that the prescribed penalty is too severe to impose upon a litigant while acting in good faith. Apart from the fact that the Court has no right to hold the penalty which Congress saw fit to prescribe is too severe, the latter suggestion is, we think, answered by the above statement to the effect that in this case the appellant had no fair ground upon which to base its refusal to pay the seaman his wages.

Nor do we think the ordinary rule respecting the merger of a cause of action in a judgment applicable to such a case as the present; for while the statute declares that the prescribed penalty "shall be recoverable as wages in any claim made before the Court", it does not limit it to the time of the entry of the judgment of the trial Court, but, on the contrary, expressly declares that the master or owner who refuses or neglects to make payment of the seaman's wages in the manner therein specifically prescribed "without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods".

Certainly by appealing from the judgment of the Court of First Instance and procuring a stay of that judgment, the appellant as effectively delayed

the payment of the wages adjudged to be due the seaman as it did by refusing without sufficient cause to pay him his discharge, and we can see no valid ground for holding that a court of admiralty in disposing of a cause so brought before it may not give effect to the express requirement of the statute by directing the Court below to enter the appropriate judgment upon the return of the cause to it. Congress did not see fit to allow the legal interest on the judgment first entered by the trial Court to compensate the seaman for the delay in the payment of his wages in the prescribed circumstances, but expressly declared that he should be allowed "a sum equal to one day's pay for each and every day during which payment is" so delayed.

It results that the judgment of the Court below was correct when rendered, but, as under the provisions of Section 4529 of the Revised Statutes the appellee is entitled to one day's pay for every day since October 1, 1913, in addition to the amount due him for services, the cause is remanded to the Court below with directions to enter a decree in accordance with the views above expressed, with costs to the appellee in both Courts.

(Endorsed): Opinion. Filed May 18, 1914.
(Signed) F. D. Monckton, Clerk.

APPENDIX B.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Pacific Mail Steamship Company (a corporation), Appellant, vs. Ed. Schmidt, Appellee.	No. 2352

[DISSENTING OPINION.]

DIETRICH, District Judge:

I am unable to concur in that part of the opinion in which it is held that the lower Court should now enlarge the original decree by including therein the statutory penalty for the time which has elapsed since the decree was entered. I fail to see any substantial reason for concluding that the plaintiff's cause of action was not merged in and swallowed up by the decree, as is the general rule. United States v. Price, 50 U. S. 83, 93.

As to the severity of the penalty, there is of course no thought of suggesting that a court can properly decline to enforce a statute because it may seem to be unnecessarily harsh. But the question being, what is the meaning of the statute, what penalty Congress really intended to impose,

it is deemed proper to consider the effect of the law in practical operation; for if, under one of two possible constructions it will operate with extreme and unnecessary severity, and under the other it will operate reasonably and yet accomplish the purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the Court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the Court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30.00, penalties amounting to approximately $800.00 have already accrued during the pendency of the appeal. The right of appeal is thus virtually denied, for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim, but that does not necessarily imply bad faith or a willingness to oppress; it is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this Court; it also presents here, as is its right, the question of the correctness of the lower Court's holding that the case falls within the provisions of Section 4529 of the Revised Statutes, imposing the penalty complained of, and this I conceive to

be a fair question the answer to which is not free from serious doubt.

It is to be borne in mind that the law is rendered harsh, not by interpreting it in the light of a general principle, that is, the principle of merger, with which it may be assumed Congress was familiar, but by holding that it is exempt from the operation thereof, and is an exception to the rule. No reason is assigned for such a course except that which may be found in a rigidly literal reading of the provision. But why should we insist that the strict letter of the provision prevail over the presumption that Congress intended that in the administration of the law regard should be had for the general principles under which other laws of like character are administered. A decision directly in point is that of Mass. v. Western Union Telegraph Co., 141 U. S. 40, 46. A statute of Massachusetts imposed a penalty for the non-payment of taxes "at the rate of twelve per cent per annum until the same (the taxes) are paid". There, as here, by the strict terms of the law there was to be a continuous accumulation of the penalty until the principal obligation was discharged. But the Court said: "The penal rate of twelve per cent interest ran only until the amount to be recovered was judicially ascertained. Since the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of six per cent only". Upon principle I cannot see how that case can be dis-

tinguished from this, and it should I think be held to be conclusive.

Appreciating the strain, the appellee suggests that this being an admiralty case the trial here is *de novo,* and that final decree is in this Court; but this is an erroneous assumption. Benedict's Admiralty (4th Ed.), Sec. 566. As appears from the opinion, there has been no new trial, nor will any decree be entered here.

(Endorsed): Dissenting Opinion. Filed May 18, 1914.

(Signed) F. D. Monckton, Clerk.